IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOSEPH WARD, MICHAEL ANDERSON, ISAAC LEMELLE, DISABILITY RIGHTS TEXAS, CECIL ADICKES, MICHAEL GIBSON, KENNETH JONES, MARY SAPP, Plaintiffs,	) AU:16-CV-00917-LY
V.	) AUSTIN, TEXAS
COURTNEY PHILLIPS, Defendant.	) NOVEMBER 19, 2019

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TRANSCRIPT OF CLASS CERTIFICATION HEARING
BEFORE THE HONORABLE LEE YEAKEL

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Proceedings recorded by computerized stenography, transcript produced by computer.

09:28:40 (Open court)

09:28:40 THE COURT: We're here this morning on a hearing on the motion for class certification in *Ward*, and others, *v. Smith*. Let me get announcements, beginning with the plaintiff, as to who is here and who you represent, please.

09:28:56 MS. SNEAD: Yes, Your Honor. Lisa Snead for Joseph Ward et al., plaintiffs.

09:29:03 THE COURT: All right.

09:29:04 MS. MITCHELL: Beth Mitchell with the plaintiffs, along with Peter Hofer, Coty Meibeyer, and Michael Gaddis.

09:29:11 THE COURT: Okay. Thank you-all.

09:29:14 And for the defendants?

09:29:16 MR. ABRAMS: Good morning, Your Honor. Michael Abrams for the defendant. And joining me at counsel table is Chris Hilton with the Attorney General's Office, Corey Kintzer, who is in-house counsel with HHSC, Chris Lopez, who is in-house counsel with HHSC, and Kim Gdula, who is an attorney in the Attorney General's Office, and Tom Albright.

09:29:35 THE COURT: All right. Very good. So did you-all get together ahead of time to make sure it was six to five? Well, we've got six over here now. You're at the end. I want to make sure it's fair.

09:29:47 All right. Well, here is what our order of march is going to be today. I've had a matter come up I need to tend to over the noon hour, but that's not going to affect the time

09:29:58 I've allocated you to do this. What we're going to do this
09:30:02 morning is we will begin, and we'll go to about 11:15. We'll
09:30:08 go straight through, and then we're going to break until 1:30.
09:30:11 I realize that's an inconvenience, but time is at a
09:30:14 premium now. Write your senators and congressmen and get me
09:30:19 another federal judge here, preferably two, and this would go a
09:30:22 lot more expeditiously.
09:30:24 So first thing is I am granting and signing the order
09:30:33 on using the redacted materials, so you can consider that done.
09:30:44 Now, let me address this to the --
09:30:49 Ms. Oakes, here is this.
09:30:50 -- the plaintiffs: Ms. Snead, are you going to
09:30:52 reserve some of your time to rebut? How do you want to handle
09:30:56 your time?
09:30:56 MS. SNEAD: Yes, sir. If we get all the way to the
09:30:59 point where we only have 15 minutes left, I would like to
09:31:02 reserve that for rebuttal. I anticipate I can finish before
09:31:05 then. But if it does get to that point.
09:31:07 THE COURT: Otherwise, I'm not going to worry -- I
09:31:09 won't surprise you with it and just tell you to sit down or
09:31:12 anything like that.
09:31:18 All right. With that being said, we have allocated,
09:31:22 I think, adequate time to do this. I have taken a look at what
09:31:25 you've filed. I appreciate the proposed findings and
09:31:28 conclusions. As I told you before, that's very helpful to the

09:31:31 Court, and you may proceed.

09:31:39 MS. SNEAD: Good morning, Your Honor. This case concerns two classes of people who are punished by being confined for lengthy periods of time in jails when they should be promptly admitted to mental health facilities for the sole purposes of court-mandated examination and competency restoration services or NGRI evaluation and treatment.

09:32:06 By refusing to timely admit them for these services that are the only purposes for their confinement, Defendant is violating their substantive due process rights to have the nature and duration of their confinements bear reasonable relation to the purposes for which they are confined.

09:32:22 Defendant in this case is Dr. Courtney Phillips, who has been sued in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission. Because she has been sued in her official capacity, I use the terms "defendant" and "HHSC" interchangeably.

09:32:39 We are here today to establish that Plaintiffs satisfy their burden for class certification for both of their proposed classes, the first consisting of incompetency detainees who have been ordered to receive examination and competency restoration services in Defendant's mental health facilities and, yet, because of Defendant's self-imposed insufficient forensic capacity, languish in jail more than 21 days after Defendant has received their commitment orders.

09:33:08 The second class consists of individuals found not
09:33:11 guilty by reason of insanity, or NGRI, who have similarly been
09:33:15 ordered into Defendant's mental health facilities for NGRI
09:33:20 evaluation and treatment and, yet, they too remain in jail
09:33:23 longer than the 14 days allowed by state statute, again,
09:33:27 because of defendant's self-imposed insufficient forensic
09:33:30 capacity. The membership of these classes is over 600
09:33:34 individuals combined, not including unknown future members.
09:33:38 The evidence I am highlighting today has been filed
09:33:41 in the record in this case since July and was cited in
09:33:44 Plaintiffs' proposed findings of fact and issues of law. With
09:33:48 the exception of the declarations attached to Plaintiffs' class
09:33:51 motion, the evidence I discuss today was produced by Defendant
09:33:53 in discovery in response to interrogatories, requests for
09:33:57 production, or during depositions.
09:33:59 I'll begin today with commonality of the classes,
09:34:03 followed by numerosity of the NGRI class, before turning to the
09:34:07 incompetency detainee class to briefly address their
09:34:11 numerosity, which Defendant has not challenged. Next I'll
09:34:14 introduce the named plaintiffs and establish how their claims
09:34:17 are typical of the classes they seek to represent and then
09:34:19 address the adequacy of them, their next friends, and class
09:34:22 counsel. I'll conclude by addressing the 23(b)(2) elements.
09:34:27 As noted by the Fifth Circuit in this case, citing
09:34:29 the *Yates* and *Walmart* cases, to satisfy Rule 23(a)'s

09:34:33 commonality requirement, the putative class claims must depend
09:34:37 upon a common contention which must be of such a nature that it
09:34:41 is capable of class-wide resolution. The *Walmart* case split
09:34:46 the inquiry in two elements that Plaintiffs must prove: the
09:34:48 first, that their exists a common policy or practice, including
09:34:54 an implicit one, that is the alleged source of harm for class
09:34:56 members and, two, that there are common questions of law or
09:34:58 fact that will be dispositive of the putative class's claims.
09:35:02 Plaintiffs have identified Defendant's practice of
09:35:05 capping its forensic capacity at a level insufficient to timely
09:35:09 admit incompetency detainees for the examination and competency
09:35:14 restoration services and the NGRI acquittees for the evaluation
09:35:19 and treatment that are the sole purposes of their confinements
09:35:22 as the source of their harms.
09:35:23 To manage the overflow of admissions created by their
09:35:27 insufficient forensic capacity, Defendant uses first-come,
09:35:30 first-served wait lists. Because Defendant refuses or has
09:35:34 failed to timely admit both class members to its facilities,
09:35:38 the class members languish in jail where they suffer harm.
09:35:42 To explain how Defendant's policy or practice has
09:35:44 harmed the incompetency detainee class, I'll start with a very
09:35:48 brief overview of 46B. Under the Texas Code of Criminal
09:35:52 Procedure Article 46B, all criminal proceedings against a
09:35:57 defendant who was incompetent are stayed until the defendant is
09:36:00 restored to competency and, most importantly, the code provides

09:36:04 1 that there are only two purposes for the detainee's continued
09:36:09 2 confinement: their examination and their receiving competency
09:36:13 3 restoration services. This examination and these services must
09:36:16 4 be provided with the specific goal of having the defendant gain
09:36:20 5 competency to stand trial.
09:36:26 6 The standard for substantive due process for
09:36:28 7 involuntary confinement in this context comes from *Jackson v.*
09:36:29 8 *Indiana*, whether the nature and duration of the detention is
09:36:32 9 reasonably related to the purpose for their confinement. Under
09:36:37 10 *Zadvydas*, courts determined the purpose for confinement by
09:36:39 11 looking at the language of the statute in question.
09:36:41 12 So in this case the ultimate inquiry will be whether
09:36:45 13 the nature and duration of the incompetency detainees'
09:36:48 14 confinements is reasonably related to their receiving the
09:36:52 15 examination and competency restoration services provided with
09:36:55 16 the specific goal of restoration.
09:36:57 17 Under 46B a criminal court can order the examination
09:37:01 18 and competency restoration services be provided to an
09:37:05 19 incompetent defendant in three settings. The first is on an
09:37:09 20 outpatient basis as a condition of bail, the second is in a
09:37:12 21 jail-based competency restoration program, and the third is in
09:37:16 22 an HHSC mental health facility.
09:37:18 23 While the class members come exclusively from the
09:37:22 24 incompetency detainees who are ordered to HHSC mental health
09:37:28 25 facilities, because Defendant has made arguments about which

09:37:30 detainees go to outpatient commitments and jail-based programs,
09:37:34 I do want to address them briefly.
09:37:36 Looking to the first of two options, there are
09:37:42 several factors that limit a court's ability to release an
09:37:45 incompetency detainee to an outpatient commitment, including
09:37:49 but not limited to, the availability of an outpatient program,
09:37:52 whether the individual is a danger to others, and whether they
09:37:54 can be safely treated in the community.
09:37:57 Availability is the determining factor in many
09:38:01 places. Defendant, in its responses to Plaintiffs' 2017
09:38:04 interrogatories attached to Plaintiffs' motion as Exhibit K,
09:38:08 admitted that there are only eleven outpatient competency
09:38:11 restoration programs serving individuals incarcerated in only
09:38:14 35 counties in the entire state of Texas.
09:38:17 The second option, formal jail-based competency
09:38:23 restoration, is an option only where it is, quote, available
09:38:26 and appropriate for a particular detainee under 46B.073.
09:38:30 However, these programs are even less common. There are only
09:38:33 five jails in the entire state with a program that satisfies
09:38:37 the requirements of Code of Criminal Procedure 46B.091 to
09:38:43 be considered sufficient competency restoration services.
09:38:47 The majority of the individuals who are found
09:38:50 incompetent to stand trial are thus sent to HHSC mental health
09:38:53 facilities, including many who would qualify for outpatient
09:38:57 commitment or jail-based competency restoration programs, but

for the county their jail is located in.

For these incompetency detainees, HHSC is the sole entity charged with providing them the specialized examination and competency restoration services that are the sole purpose of their continued confinement. It is solely up to the detainee's criminal court which of these three alternatives the detainee is ordered to. HHSC has no discretion over which incompetency detainees criminal courts order into its mental health facilities and which are sent to the other two programs.

The Code of Criminal Procedure provides that the order committing the detainees to the HHSC mental health facility must place them into the custody of the sheriff for transportation to the program where they will receive competency restoration examination and services.

This provision is written with the clear intent that this transportation from jail to the HHSC mental health facility will occur promptly; that their commitment into the custody of the sheriff is not for them to remain confined for lengthy periods in jail, but for transportation to occur.

Though prompt admission to HHSC mental health facilities is the clear intent, this is not what is occurring. Instead, according to the quarterly report for April 2019, the average wait for detainees on the clearinghouse wait list is 49 days, and the MSU wait list, with 446 people on it, has an average wait time of 263 days waiting in jail before HHSC makes

a bed available.

As Defendant agreed in the parties' statement of uncontested facts and issues of law, the universe of beds that HHSC has in state hospitals or has funded or has contracted at private facilities currently equals 2,870 inpatient beds for forensic and civil commitments.

2,269 of these, Deputy Executive Commissioner Mike Maples identified --

THE COURT: Let me ask you a question there.

MS. SNEAD: Yes.

THE COURT: Back up, if you would, to slide 13.

MS. SNEAD: Yes, Your Honor.

THE COURT: Explain what the clearinghouse is, if you would.

MS. SNEAD: Yes. So I'm -- the clearinghouse list -- Defendant has divided their wait list into essentially two waiting lists. One is the clearinghouse wait list which contains the individuals who are ordered into the non-maximum security hospitals that Defendant operates. The MSU wait list stands for Maximum Security Unit Wait list. And those are the individuals that courts have committed to maximum security units.

THE COURT: All right. So on -- tell me who can be on either wait list. On the clearinghouse wait list, can it be individuals that are destined for outpatient, jail-based, and

HHSC treatment?

MS. SNEAD: No, Your Honor.

THE COURT: Okay.

MS. SNEAD: The only people that go on the wait list are those who are ordered into HHSC mental health facilities.

THE COURT: All right. So both of the wait lists only apply to HHSC; is that right?

MS. SNEAD: Correct, Your Honor.

THE COURT: Okay. Thank you.

MS. SNEAD: So the parties agreed there are 2,870 beds total to serve both forensic, the incompetent to stand trial and NGRI folks, and the nonforensic. 2,269 of those beds Deputy Executive Commissioner Mike Maples identified in his deposition, which was attached to Plaintiffs' motion as Exhibit B as state hospital beds, which HHSC has the discretion to allocate how it pleases between the forensic population and the nonforensic.

As Defendant explained in its answers to the 2017 interrogatories, in 2006, forensic detainees ordered into HHSC mental health facilities for examination and competency restoration services began exceeding the cap that HHSC had set for forensic commitments. HHSC placed detainees who exceeded the cap that they set on one of two wait lists that HHSC created that year until a bed became available. And those two wait lists were the clearinghouse list and the MSU wait list

09:43:16 from the previous slide.

09:43:18 It is an uncontested fact that HHSC has no formal
09:43:22 criteria for determining this allocation of forensic versus
09:43:26 nonforensic beds and that any adult general psychiatric bed in
09:43:32 one of HHSC's state hospitals can be used for either
09:43:35 population. And according to Associate Commissioner Bray's
09:43:39 declaration, which was attached to Defendant's response, HHSC
09:43:42 has currently capped forensic admissions to 65 percent of the
09:43:46 state hospital beds, or 1,474 beds. The remaining 35 percent,
09:43:53 or 794 beds, are currently designated for nonforensic
09:43:57 admissions.

09:43:58 And, Judge, this gets to the question you were just
09:44:04 asking. According to Associate Commissioner Bray and
09:44:08 Defendant's interrogatory responses, HHSC places only the
09:44:11 detainees ordered to their facilities onto these lists, and it
09:44:16 does not include individuals committed to outpatient or
09:44:18 jail-based competency restoration. As both Deputy Executive
09:44:25 Commissioner Maples and Associate Commissioner Bray admitted
09:44:29 during their depositions in this case, taken in April of this
09:44:31 year, while on these wait lists, the incompetency detainees
09:44:36 remain in jails.

09:44:39 Now, these are the two wait lists that you asked
09:44:41 about a moment ago, Judge. It is an uncontested fact that
09:44:45 these are the two wait lists that HHSC created. The
09:44:47 clearinghouse wait list is for individuals found incompetent to

09:44:51 stand trial and committed to the non-maximum security units,
09:44:55 while the maximum security wait list is for the remaining
09:44:58 individuals found incompetent to stand trial, for individuals
09:45:01 found not guilty by reason of insanity, and a small number of
09:45:05 civil committees found manifestly dangerous.
09:45:08 HHSC has repeatedly admitted, and it is uncontested,
09:45:14 that HHSC places individuals on its two wait lists on a
09:45:19 first-come, first-served basis; that it admits detainees off
09:45:25 these lists in the same order, first-come, first-served; and
09:45:29 that it places all detainees who are ordered to its facilities
09:45:34 on these lists.
09:45:44 THE COURT: And so to make sure I understood exactly
09:45:46 what you said, the individuals that go on the list remain in
09:45:49 county jail until they get to a high enough position on the
09:45:52 list to be placed with HHSC; is that right?
09:45:54 MS. SNEAD: Yes, Your Honor.
09:45:55 THE COURT: All right.
09:45:55 MS. SNEAD: Until HHSC admits them.
09:45:57 THE COURT: All right.
09:45:58 MS. SNEAD: These wait lists are how HHSC has decided
09:46:03 to treat everyone the same and manage the problem they've
09:46:06 created with their insufficient capacity. A review of the wait
09:46:11 lists provided to Plaintiffs and filed as sealed Exhibit N
09:46:14 proves that the time detainees spend on these lists exceeds 21
09:46:18 days and, in many cases, far exceeds it. As I noted before,

09:46:22 the average wait for the clearinghouse in April was more than
09:46:26 twice this, at 49 days, and the MSU list more than 10 times
09:46:30 this, at 263 days.
09:46:32 Nor are there exceptions to Defendant's common policy
09:46:36 or practice. During class discovery in this case in April
09:46:40 2019, Plaintiffs deposed Timothy Bray, Associate Commissioner
09:46:45 for State Hospitals. In this position, Associate Commissioner
09:46:47 Bray is responsible for the operation of all state hospitals,
09:46:52 including oversight over the two waiting lists.
09:46:55 Associate Commissioner Bray noted during his
09:46:58 deposition that, if there have been deviations from the
09:47:00 first-come, first-served policy for either list, that as
09:47:04 associate commissioner he would have been aware of it. With
09:47:07 this in mind, he stated under oath that in the six months
09:47:09 before his deposition, there were zero exceptions to HHSC's
09:47:13 first-come, first-served policy for detainees on the
09:47:17 clearinghouse wait list. Similarly, he stated that in the six
09:47:21 months before his deposition, there were fewer than ten people
09:47:24 out of over 700 people on HHSC's MSU wait list who were
09:47:29 admitted to hospitals as exceptions to the first-come,
09:47:31 first-served policy. The other more than 98.6 percent of
09:47:37 individuals were universally admitted first-come, first-served.
09:47:41 Defendant's practice has caused a common harm. While
09:47:45 they wait in jails on HHSC's wait lists, incompetency detainees
09:47:50 do not receive the examination or competency restoration

09:47:54 services that are the sole purpose of their confinements
09:47:57 because jails, outside of the five with formal jail-based
09:48:00 competency programs, are not required by law to provide and do
09:48:04 not provide examination or competency restoration services.
09:48:08 Under the standard articulated in *Bell v. Wolfish*, a
09:48:14 detainee's confinement violates substantive due process when it
09:48:18 amounts to punishment, and detention amounts to punishment
09:48:20 when, under *Jackson*, the nature and duration of the commitment
09:48:23 does not bear a reasonable relation to the purpose for
09:48:26 confinement.
09:48:26 The proposed IST plaintiffs are thus harmed, and in
09:48:31 fact punished, under the standard articulated in *Bell* by being
09:48:35 confined in jails for lengthy periods of time without their
09:48:39 court-mandated examination and competency restoration services
09:48:42 that are the sole purpose of their continued confinement. In
09:48:45 contrast, it is uncontested that HHSC's mental health
09:48:50 facilities, unlike local jails, have staff specifically trained
09:48:53 to provide the examination and competency restoration services
09:48:57 and do in fact provide these services.
09:49:01 As further proof that jails outside of the five with
09:49:03 formal programs do not provide examination or competency
09:49:07 restoration services, Plaintiffs have filed sworn declarations,
09:49:10 attached as Exhibits I and J to Plaintiffs' motion, from
09:49:14 Dr. Laxman Sunder, the Executive Director of Health Services
09:49:18 for Harris County Jail, and Daniel Smith, the Director of

Inmate Mental Health for Travis County Jail. Both Dr. Sunder and Director Smith declared under oath that their jails, two of the largest in the state, do not provide any competency restoration examination or services.

Now, Defendant argues that because some people receive medications in jail and this can sometimes have a beneficial effect, that medication alone can constitute competency restoration services that are the sole purpose of the detainee's continued confinement.

While this argument is most appropriately saved for consideration of the merits of Plaintiffs' claim, because Defendant has introduced this red herring here as an argument against commonality is worth touching on briefly.

First, this argument ignores entirely that the language of 46B provides that incompetency detainees shall be confined for purposes of examination and competency restoration services. Medication alone clearly is not any kind of examination, which is one of the mandated purposes of confinement under 46B. Second, this argument is conclusory. Defendant has provided no evidence regarding how frequently this spontaneous restoration occurs, relying only on the vague statement of Dr. Faubion that it can happen.

Yet Dr. Faubion was identified in Defendant's responses to both the 2017 and 2019 interrogatories as the medical director at Kerrville State Hospital, he has only

recently been appointed to this position as chief of forensic medicine, as this position still listed as open when Defendant provided its last interrogatory responses.

The patients at his prior hospital in Kerrville do not come straight from jail but, rather, are transferred from other hospitals. It is, therefore, not clear how this Dr. Faubion came to this conclusion, since he provides no explanation or evidence outside of his conclusory assertion, and his own most recent experience isn't with the incompetency detainee population.

Third, Defendant's medication-alone argument is disingenuous, as Defendant knows medications alone aren't sufficient, as HHSC own programs within state hospitals do not solely provide medications. As detailed by Dr. Faubion's own declaration attached as Exhibit B to Defendant's response, the competency restoration programs at the state hospital include educational classes and psychosocial rehabilitation programs.

Defendant's argument that medication alone can be sufficient competency restoration services is directly contradicted by the Texas Legislature's statement of what constitutes sufficient competency restoration services as well as the declaration of Dr. Joel Dvoskin, provided as Exhibit S to Plaintiffs' motion.

46B and Dr. Dvoskin both identify an exacting standard, and services that do not satisfy these requirements

are not sufficient competency restoration services. These requirements include, but are not limited to, providing competency restoration services in a safe and separate space away from the general population of inmates; providing individualized services through a multidisciplinary team similar to other competency restoration programs like HHSC's at the state hospital; and providing these services, including the educational component, to the same extent as would be provided in an inpatient mental health facility.

It is clear that a county jail providing medication to an inmate does not come close to meeting these standards, even if it sometimes produces a benefit for some inmates who take them, though it shouldn't be assumed that medications always provide benefits. As noted in the sworn declarations provided by their next friends, both Plaintiffs Ward and Jones took medications in the jail while they waited for an HHSC mental health bed, and yet both still remained incompetent.

Indeed, 46B.086, the provision that authorizes court-ordered medication in jail under certain circumstances for incompetency detainees provides that even court-ordered medications in jail do not constitute the authorization to keep the detainee in the facility under the guise of competency restoration treatment.

If the objective is successful competency restoration treatment, confining people in jail longer is actually more

likely to make their mental health illnesses worse, according to Dr. Dvoskin, meaning that keeping individuals in jail even with medications is not only not competency restoration services but is ultimately counterproductive to successful restoration.

Finally, for competency restoration services to be sufficient under 46B.073, the services must be provided, quote, with the specific objective of the defendant attaining competency to strand trial. While some jails do provide psychotropic medication, it is not done for purposes of competency restoration but, rather, to address a variety of other concerns, including satisfying minimum jail standards. This is why, in the declarations from Dr. Sunder and Director Smith, both men can say that their jails provide psychotropic medications and yet do not provide competency restoration services.

For plaintiffs in the proposed IST class, HHSC is thus the only provider of these services that are the purpose of their continued confinement, and they cannot receive these services until HHSC admits them to one of its mental health facilities.

Until then they wait in jail where they suffer additional harms on top of the harms to their liberty interests, including, as noted by the next friends in their sworn declarations, the delaying of their criminal cases by

09:55:10 over a year in some cases, which negatively impacts their
09:55:14 attorneys' abilities to adequately represent them, to identify
09:55:17 witnesses, and to enter into plea negotiations.
09:55:22 Further harms caused by being in jail for lengthy
09:55:25 periods of time rather than a mental health facility are
09:55:29 detailed in Dr. Dvoskin's declaration, Exhibit S, and include
09:55:32 the exacerbation of serious mental illnesses which leads to
09:55:35 detainees harming themselves, experiencing more severe
09:55:39 hallucinations and delusions, and disrupting other detainees,
09:55:43 leading to their becoming victims of jail violence -- harms, in
09:55:46 fact, experienced by several of the named plaintiffs, as I will
09:55:48 detail shortly.
09:55:50 The evidence that IST class members may be held for
09:55:54 different lengths of times, causing them to experience these
09:55:57 harms to different degrees, does not preclude class
09:55:59 certification. It is sufficient that Plaintiffs have
09:56:01 established a common injury resulting from a common practice.
09:56:05 Indeed, this was the conclusion in *Steward v. Janek*, where a
09:56:09 Western District of Texas District Court granted class
09:56:12 certification for individuals with intellectual disabilities
09:56:16 being held in Medicaid-funded nursing homes, despite the fact
09:56:20 that each individual member had different health needs and had
09:56:23 thus experienced harm in significantly different degrees.
09:56:27 This was also true in *M.D. v. Perry* after remand,
09:56:31 brought on behalf of classes of Texas foster children who had

all experienced harm from the insufficient foster care system in unique ways, and *Yates v. Collier*, upheld by the Fifth Circuit, which affirmed class on behalf of prison inmates who all experienced harmed caused by high temperatures, even though the degree of harm varied based on the medical conditions of the individual inmates.

Now, Defendant harps on the idea of individualized determinations being necessary before admission to its facilities and this precluding class relief. However, Defendant itself treats all of the proposed plaintiffs the same. The evidence clearly shows that the putative class members universally go on one of the two wait lists, they universally are forced to wait in jails without the services that are the only purposes for their confinement, and they universally come off the list in order first-come, first-served. Individual determinations aren't occurring by Defendant's own repeated admissions.

And Defendant's over-reliance on *Powell* does not establish otherwise. First, *Powell* is an outlier. It is a single Maryland state law case, which no other case has ever cited for the proposition that Defendant uses it for, not even in Maryland. Further, contrary to Defendant's assertion, *Powell* does not stand for the proposition that a court can never define a *Jackson* due process violation with respect to a time limit because an individualized inquiry is always

09:57:57 necessary.

09:57:57 What that court actually stated was that, given the
09:58:01 limited record in front of it, based on only four plaintiffs
09:58:04 who waited between only 12 and 36 days for transfers to a
09:58:08 mental health facility and with only three other potential
09:58:12 class members waiting, that it was not prepared to prescribe an
09:58:16 across-the-board rule for seven people. *Powell* is no bar to
09:58:19 this Court granting class certification, and this Court should
09:58:22 frankly ignore it. It has no precedential value and is easily
09:58:27 distinguished.

09:58:28 Looking to the second element for commonality under
09:58:31 *Walmart* and cited by the Fifth Circuit in this case, Plaintiffs
09:58:34 have also identified a common question of fact and common
09:58:38 questions of law, the answers to which will determine
09:58:41 Plaintiffs' claims in one stroke.

09:58:43 The common question of fact is whether HHSC has
09:58:46 failed to accept in a timely manner, i.e., within 21 days of
09:58:51 receiving the court's order, the admission of plaintiffs and
09:58:53 class members to its mental health facilities for the
09:58:55 competency restoration treatment as ordered by criminal courts.

09:59:00 The first question of law is whether this failure
09:59:03 which causes class members to be warehoused in county jails
09:59:06 without the examination and competency restoration treatment,
09:59:09 which is the purpose of their confinements, thus violates the
09:59:13 Fourteenth Amendment to the U.S. Constitution, and the second

09:59:15 is whether plaintiffs and class members are thus entitled to
09:59:18 the declaratory and injunctive relief they seek.
09:59:22 The answers to these question will determine
09:59:24 Plaintiffs' case in one stroke. Therefore, Plaintiffs have
09:59:27 identified common questions that establish commonality of the
09:59:30 IST class and have carried their second burden under *Walmart*.
09:59:48 Turning to the NGRI class, similar to the
09:59:51 incompetency detainee plaintiffs, the NGRI plaintiffs have
09:59:54 identified Defendant's practice of capping its forensic
09:59:57 capacity at a level insufficient to admit NGRI acquittees
10:00:02 within 14 days for the NGRI evaluation and treatment that are
10:00:06 the purpose of their confinements as the source of their harms.
10:00:10 To manage the overflow of admissions created by their
10:00:13 insufficient capacity, Defendant uses first-come, first-served
10:00:16 wait lists.
10:00:17 Because the acquittee stands acquitted of the offense
10:00:20 charged, they may not be considered a person charged with an
10:00:23 offense. And because they are no longer charged with an
10:00:26 offense, after a person is acquitted NGRI, the only purpose for
10:00:31 the NGRI acquittee's continued confinement is, quote, for
10:00:35 evaluation of the person's present mental condition to
10:00:39 determine the appropriateness of continued confinement and
10:00:41 treatment.
10:00:46 Immediately upon a finding that a person is NGRI, the
10:00:49 criminal court looks solely to whether the offense for which

10:00:52 the person was acquitted concerned dangerous conduct. There is
10:00:56 absolutely no evaluation or consideration of the current
10:01:00 condition of the NGRI acquittee, much less a court hearing.
10:01:04 The criminal courts have no discretion. If an acquittee is
10:01:07 acquitted of certain crimes, they must go to an HHSC mental
10:01:13 health facility for their NGRI evaluation that is the purpose
10:01:16 of their confinement, and HHSC must accept them.
10:01:21 46C itself provides a 14-day maximum time limit
10:01:25 during which the NGRI acquittee can be held pending transfer to
10:01:30 a maximum security HHSC mental health facility to receive the
10:01:34 NGRI evaluation that is the purpose for their of confinement.
10:01:38 However, rather than accepting those NGRI acquittees
10:01:41 within 14 days, HHSC likewise places these acquittees on its
10:01:44 wait lists, admitting in it's fifth amended answer filed
10:01:48 earlier this year that NGRI acquittees often wait weeks or
10:01:53 months before they are admitted to HHSC mental health
10:01:57 facilities.
10:01:57 While they wait for HHSC to finally make room for
10:02:00 them, these NGRI acquittees receive no NGRI evaluation. Texas
10:02:04 jails are not required to provide it and do not provide this
10:02:08 service. Only HHSC provides the evaluation that is the sole
10:02:12 purpose for the confinement of NGRI acquittees.
10:02:16 These class members have been acquitted. Their
10:02:18 continued confinement in jail when they are not guilty and are
10:02:22 not receiving the evaluation that is the purpose of their

10:02:25 continued confinements is harmful and amounts to punishment
10:02:28 under *Bell*. The delays in transfer also harm NGRI acquittees
10:02:32 by necessarily prolonging their overall periods of confinement
10:02:37 before they may be eligible for outpatient commitment and
10:02:40 forces them to experience many of the same harms in jail
10:02:42 identified by Dr. Dvoskin, including decompensation, segregated
10:02:47 confinement, and possible victimization. NGRI Plaintiffs have
10:02:51 thus carried their burden by identifying Defendant's common
10:02:54 policy or practice as the source of their harms.
10:02:57 And as to the common questions of fact and law,
10:02:59 Plaintiffs have also satisfied this burden. The common
10:03:02 question of fact is whether HHSC has failed to accept in a
10:03:07 timely manner, i.e., within 14 days of receiving the court's
10:03:11 order, the admission of plaintiffs and class members to its
10:03:14 mental health facilities for NGRI evaluation, as ordered by
10:03:18 criminal courts.
10:03:18 The first question of law is whether this failure,
10:03:21 which causes class members to be warehoused in county jails
10:03:24 without the NGRI evaluation, which is the purpose of their
10:03:26 confinements, thus violates the Fourteenth Amendment to the
10:03:30 U.S. Constitution, and the second is whether plaintiffs and
10:03:33 class members are thus entitled to the declaratory and
10:03:36 injunctive relief they seek. The answer to these questions are
10:03:40 yes or no. The answers will thus resolve Plaintiffs' claims
10:03:44 with one stroke.

10:03:45 Plaintiffs have thus identified common questions that
10:03:49 establish commonality of the NGRI class and have again carried
10:03:53 their second burden under *Walmart*.
10:03:55 Turning to numerosity, I am going to stay with the
10:03:58 NGRI class first since this is the only class whose numerosity
10:04:03 is challenged.
10:04:04 Numerosity requires that the class members be so
10:04:07 numerous that joinder of all members is impracticable. The
10:04:11 Fifth Circuit in this case cited *Ibe* in noting that factors
10:04:16 inform this decision include the geographical dispersion of the
10:04:20 class, the ease with which class members may be identified, the
10:04:22 nature of the action, and the size of each plaintiff's claims.
10:04:26 Other factors highlighted in case law, including
10:04:30 *Steward v. Janek* from this circuit, *Armstead*, and *Barnes v.*
10:04:34 *Board of Trustees*, include the class members' disabilities,
10:04:38 their poverty, and their isolation.
10:04:41 In the last approximately three years, the proposed
10:04:44 NGRI class has contained over 120 members who came from at
10:04:49 least 51 different jails dispersed across the state.
10:04:54 Specifically, while HHSC itself combines the NGRI acquittees
10:04:58 and incompetency detainees on the MSU wait list provided as
10:05:03 Exhibit N, a review of the lists establishes that, in 2017, the
10:05:07 year that Plaintiffs filed their original class motion, there
10:05:11 were at least 75 NGRI acquittees, based on partial data, who
10:05:16 remained incarcerated in county jails for more than 14 days.

10:05:20 The following year, in 2018, the year that Plaintiffs
10:05:24 argued the class certification order in the Fifth Circuit, out
10:05:27 of 81 total acquittees ordered to receive NGRI evaluation and
10:05:31 treatment at an HHSC mental health facility, 68 were confined
10:05:36 longer than 14 days. And in the first six weeks of this year
10:05:41 alone, there were seven NGRI acquittees who waited longer than
10:05:45 14 days.
10:05:46 This was the last data Defendant provided to
10:05:48 Plaintiffs' attorneys before the discovery period closed.
10:05:52 Extrapolating this data, seven NGRI acquittees who waited
10:05:56 longer than 14 days within the first six weeks of 2019 yield a
10:06:01 total of 61 NGRI acquittees for the 52 weeks of 2019 as a
10:06:06 whole. This number is consistent with the totals from the
10:06:09 previous two years.
10:06:11 In contrast, Defendants have asserted that the NGRI
10:06:14 class is now not numerous because it only had two members on
10:06:18 the day in July when Associate Commissioner Bray signed his
10:06:22 declaration. However, this number is misleading. Defendant
10:06:25 hangs its hat on a single static number on a single day in a
10:06:29 system that isn't static. Deputy Commissioner Maples stated in
10:06:33 his deposition in April that the NGRI list, quote, comes and
10:06:36 goes and then immediately admitted that the list is growing
10:06:39 over time.
10:06:41 Returning to the standard articulated by the Fifth
10:06:43 Circuit and other courts, there are other factors that inform

10:06:48 numerosity that establish Plaintiffs have met their burden,
10:06:50 including the existence of future unnamed class members and
10:06:54 their disabilities, poverty, and isolation.
10:06:58 Plaintiffs' NGRI class specifically includes not only
10:07:01 those currently waiting in jail for more than 14 days but all
10:07:04 future NGRI acquittees who have not yet been found NGRI, but
10:07:11 once they have been, will be placed on HHSC's wait lists and
10:07:14 forced to stay in jail longer than statutory maximum without
10:07:18 receiving the NGRI evaluation that is the only purpose of their
10:07:21 confinement.
10:07:22 These class members are, by definition, unknown since
10:07:27 it is impossible to predict who will be acquitted not guilty by
10:07:30 reason of insanity until the day it happens. And because they
10:07:34 can come from any of the 254 counties in the state, will be
10:07:37 geographically dispersed. The not guilty by reason of insanity
10:07:43 class, both the current and former members, are all persons
10:07:44 with significant disabilities, largely impoverished, and
10:07:48 isolated in county jails. The likelihood that they be able to
10:07:51 join this lawsuit individually or bring their own to vindicate
10:07:54 their rights is essentially nil.
10:07:57 Indeed, the original NGRI plaintiffs in this case
10:07:59 were not represented by next friends. However, Defendant
10:08:03 challenged the ability of acquittees found NGRI to represent
10:08:06 their own interests in this suit, highlighting the inability
10:08:10 the of these class members to join this suit individually.

10:08:14 Courts have looked to all of these factors in
10:08:16 certifying classes, and Plaintiffs have cited many of these
10:08:19 cases in their motion for class certification. In particular,
10:08:23 Plaintiffs' NGRI class is similar to the class in *Pederson v.*
10:08:27 *Louisiana State University*, where the Fifth Circuit held that a
10:08:31 district court abused its discretion by decertifying a class of
10:08:35 only eight identified female college students, all of whom were
10:08:40 on the LSU campus based on numerosity, largely because of the
10:08:44 existence of unnamed future members of the class consisting of
10:08:47 girls who might want to play intercollegiate softball or soccer
10:08:53 at LSU.
10:08:54 The cases cited by Defendant, *Garcia v. Gloor*,
10:08:59 *Trevizo v. Adams*, and *Jaynes v. United States* all concerned
10:09:01 class members whose identities were immediately ascertainable
10:09:05 because they did not bring classes on behalf of future class
10:09:09 members. *Cooper v. Kliebert*, an unpublished case out of
10:09:12 Louisiana and relied upon by Defendant, both has no
10:09:15 precedential value as an unpublished case and is an outlier.
10:09:20 NGRI plaintiffs here have identified nearly three
10:09:23 times the number of known class members, and based on
10:09:26 historical data, future class members would become members of
10:09:29 this class at almost three times the rate class members would
10:09:33 have joined the Louisiana case.
10:09:35 Following Cooper here means, in essence, Plaintiffs
10:09:38 would receive a new name from defendant every four to five

days, have to travel to potentially far-flung jails across the state, in addition to having to then contend with the difficulties caused by acquittee's disabilities, poverty, isolation, and have to coordinate with their criminal defense attorney to become a next friend. Under the facts here, it is simply not practicable to join all of the NGRI current and future class members into one lawsuit.

What the case law for numerosity establishes is that the determination of whether a class is sufficiently numerous is not a hard line. As *Pederson* shows, sometimes a class of eight with unknown future class members is sufficiently numerous, while *Jaynes* shows that sometimes a class of 258 known members is not, because there are other factors affecting the analysis of whether it is practicable to join the class members, including the ease of identifying members, their geographic dispersion, their disabilities, their poverty, and their isolation. Defendant has identified no published case with future unknown members who numerosity wasn't satisfied.

In light of the data and other evidence, Plaintiffs have established that the NGRI class is sufficiently numerous such that joinder is impracticable and have satisfied their burn under rule 23(a)(1).

Defendant does not challenge the numerosity of the IST class, so I will not spend too much time on then.

On March 15th, 2019, HHSC provided their monthly

update to the legislature about the status of the wait lists, which Plaintiffs provided as Exhibit Q. This chart, excluding the numbers to the far right, is a reproduction of HHSC's chart with only the wait list for individuals waiting on civil commitments removed.

According to HHSC's own chart, as of March 15th, there were 771 individuals on HHSC's two forensic wait lists combined, 80 percent of whom, or 615 individuals, remained incarcerated in county jails for more than 21 days.

Now, HHSC's chart does include a small number of NGRI acquittees. According to the February 11th, 2019 wait list in Exhibit N, which was about a month before this legislative update, the number of NGRI acquittees who had waited more than 14 days for a bed was seven. NGRI acquittees were all on the MSU wait list. So to get the number of incompetency detainees, the number of NGRI acquittees needs to be subtracted from the MSU wait list. Even assuming a high estimate of 11 NGRI acquittees a month later, on March 11th, this still leaves 418 people on the MSU wait list who were incompetency detainee acquittees.

At the time Defendant provided this update to the legislature in March, the clearinghouse list had no NGRI acquittees on it because NGRI acquittees didn't go on the clearinghouse list. So, combining these two, this puts the known incompetency detainee class members somewhere around 604

10:12:48 members, in addition to unknown, unnamed future class members.

10:12:54 Defendant's wait lists, provided as Exhibit N, prove

10:12:58 that these 600-plus detainees have waited in over 75 different

10:13:02 jails, dispersed across the state of Texas. These class

10:13:06 members all have significant disabilities that have caused them

10:13:09 to be incompetent to stand trial, and many are impoverished

10:13:15 having met the criteria for court-appointed counsel.

10:13:18 In light of these overwhelming numbers, their

10:13:20 geographic dispersion, their significant disabilities, and

10:13:25 their impoverishment, Plaintiffs have satisfied the

10:13:26 requirements for numerosity of the incompetency detainee class.

10:13:38 Turning to typicality, the Fifth Circuit articulated

10:13:44 the critical inquiry as whether the class representatives'

10:13:48 claims have the same essential characteristics as those of the

10:13:51 putative class. The court also noted in its opinion that, if

10:13:54 the claims of the named plaintiffs and putative class members

10:13:57 arise from a similar course of conduct and share the same legal

10:14:01 theory, typicality will not be defeated by factual services.

10:14:07 The plaintiffs who seek to represent the incompetency

10:14:10 detainee class through their next friends are Joseph Ward,

10:14:14 Mark Lawson, Jennifer Lampkin, Kenneth Jones, Mary Sapp, and

10:14:19 Julian Torres.

10:14:20 According to sworn declarations filed by their

10:14:23 criminal defense attorneys and next friends, each of these

10:14:26 individuals, like those they seek to represent, was found by

their criminal courts to be incompetent to stand trial; was ordered into an HHSC mental health facility for the sole purpose of receiving examination and services for the specific objective of restoring them to competency to stand trial; and, due to HHSC's self-imposed insufficient capacity, all of them were placed on one of HHSC's wait lists rather than being timely admitted to one of Defendant's mental health facilities.

It is undisputed that each and every plaintiff waited more than 21 days on HHSC's wait lists. According to Defendant's own class interrogatory responses, Joseph Ward was on HHSC's list for 405 days, Mr. Lawson for 435. Jennifer Lampkin languished for 455 days while Mary Sapp waited for 55 days. Kenneth Jones was in jail for 335 days after being found incompetent, before finally being transferred to an HHSC mental health facility. And, finally, Julian Torres waited 28 days on Defendant's clearinghouse list before he was transferred to a mental health facility.

None of the named plaintiffs, like the class they seek to represent, was offered or received competency restoration examination or services while they were in jail because Texas jails, excluding the five with formal programs, are not required to provide and do not provide these services, as confirmed by their next friends. While their details vary, every single one of the incompetency detainee plaintiffs suffered harm while they waited in jail for HHSC to make room

for them.

As attested by their next friends in their sworn declarations, Mr. Ward voluntarily took psychotropic medications, yet continued to hear command auditory hallucinations.

Ms. Lampkin was noted to be struggling in jail due to isolation and ultimately lost 30 pounds during her forced wait in jail.

Mr. Lawson was noted to be vulnerable and was placed in a single cell for over two months in order to keep him safe from other inmates, despite the fact that the experts, including Dr. Dvoskin in Exhibit S, note that segregation should be avoided for detainees with acute mental illness symptoms.

Mr. Sapp was so decompensated she spent a large period of her confinement in an infirmary ward, as she was unable to care for her own activities of daily living.

Mr. Jones also voluntarily took psychotropic medications, yet reported that he was suicidal and that his medications were not working. And, even with the medications, he reported hallucinations and delusions and got into altercations which resulted in disciplinary charges, an outcome Dr. Dvoskin noted was common in jails, as they often treat incidents that result from psychosis as deliberate rule violations.

10:17:20 Mr. Torres was so deteriorated that he spent his
10:17:24 first week of incompetency on the acute psychiatric unit of the
10:17:27 jail and the rest of his confinement on HHSC's waiting list in
10:17:30 a single-cell mental health pod, where he was isolated for 22
10:17:34 or more hours a day in his cell, again, a setting that experts
10:17:38 say is harmful to individuals experiencing acute symptoms.
10:17:41 More generally, every single one of these plaintiffs
10:17:44 was harmed by being punished by being held in a correctional
10:17:47 facility that was not rationally related to the examination and
10:17:50 competency restoration purposes of their confinement.
10:17:53 All of these named plaintiffs are represented by next
10:17:59 friends who were their criminal defense attorneys, who have
10:18:00 filed sworn declarations detailing the harms caused by
10:18:03 Defendant's practice of capping its forensic admissions at a
10:18:07 level insufficient to timely admit incompetency detainees for
10:18:12 the examination and competency restoration services that are
10:18:15 the purpose of their confinements.
10:18:17 These harms include the automatically lengthened
10:18:19 amount of time before they can be tried and restored and the
10:18:22 prolonging of their criminal cases, making it harder for their
10:18:25 attorneys to represent them, to identify witnesses, and to
10:18:27 enter into plea negotiations.
10:18:30 Plaintiffs thus have the same characteristics as the
10:18:33 proposed class members and have the same interest as the
10:18:36 proposed class: avoiding being warehoused in jail without the

competency restoration examination and services that are the sole purposes of their continued confinement.

Plaintiffs have also suffered the same injuries to their substantive due process rights as well as their criminal cases.

The incompetency detainee plaintiffs' claims are thus typical of the incompetency class they seek to represent. Plaintiffs have satisfied Rule 23(a)(3), and Plaintiffs Ward, Lawson, Lampkin, Jones, Sapp, and Torres should be named representatives of the incompetency detainee class.

The putative NGRI class is represented by Mary Sapp and Cecil Adickes, both of whom are also represented by their criminal defense attorneys as next friends. Both of them, like their fellow class members, were found not guilty by reason of insanity for charges that required that they be committed to an HHSC mental health facility.

Though the law required they be transferred to an HHSC facility within 14 days of the order, due to HHSC's self-imposed insufficient forensic capacity, HHSC instead placed them on its wait list. HHSC's responses to the 2019 class interrogatories established that both waited much longer than 14 days: 93 days for Mr. Adickes and 177 days for Ms. Sapp.

The next friends declarations show that both Ms. Sapp and Mr. Adickes, like those they seek to represent, were harmed

10:20:09 by being forced to wait. Each were punished by remaining in
10:20:13 jail after having been acquitted of their charges, without
10:20:16 receiving the services required by law.
10:20:18 The NGRI plaintiffs have thus established that they
10:20:21 share the same characteristics as the proposed class members,
10:20:26 have the same interests as their fellow class members --
10:20:30 avoiding being warehoused in jail without the NGRI evaluation
10:20:33 that is the sole purpose of their confinement -- and they have
10:20:36 the same injury to their substantive due process rights as
10:20:39 those they seek to represent.
10:20:41 Accordingly, the NGRI plaintiffs have likewise
10:20:44 satisfied their burden to Rule 23(a)(3) and Plaintiffs Sapp and
10:20:48 Adickes should be named representatives of the NGRI class.
10:20:53 Looking to the adequacy of both classes, the standard
10:20:56 articulated by the Fifth Circuit is that adequacy encompasses
10:21:01 the following three inquiries: the zeal and competence of
10:21:05 representatives' counsel; the willingness and ability of the
10:21:08 representatives to take an active role and control of the
10:21:10 litigation and to protect the interest of the absentees; and
10:21:14 the risk of conflict of interest between the named plaintiffs
10:21:17 and the class they seek to represent.
10:21:18 Looking to the plaintiffs themselves, the named
10:21:20 plaintiffs, as well as the members of the classes they seek to
10:21:23 represent, have all suffered, are suffering, or at risk of
10:21:28 suffering the same injury to their liberty and rights as a

10:21:31 result of Defendant's practice of capping its forensic capacity
10:21:35 at an insufficient level. They share the same interest in
10:21:39 prompt admission to HHSC's mental health facilities, share the
10:21:43 same harms, and seek the same relief in the form of systemic
10:21:48 change, by declaration and injunction, requiring they be
10:21:50 admitted between 21 and 14 days.
10:21:53 There is no conflict between members of the classes,
10:21:55 nor has Defendant articulated one. Instead, Defendant
10:22:00 baselessly asserts that because the named plaintiffs are no
10:22:02 longer on the wait list in jail, which is not true for
10:22:05 Plaintiff Jones, who is incompetent to stand trial and on the
10:22:08 wait list again, they won't care enough to prosecute this case.
10:22:11 First, this is a gross assumption on the part of
10:22:14 Defendant to assume that someone harmed by its practices
10:22:16 wouldn't want to see others harmed in the same way. Second, it
10:22:20 ignores the fact that at least three of the name plaintiffs did
10:22:24 find themselves on the wait lists more than once, demonstrating
10:22:26 that the claims of Plaintiffs are capable of repetition, giving
10:22:30 them an interest in not being re-injured by the defendant.
10:22:34 Both Mr. Ward and Mr. Jones have waited multiple
10:22:37 times on Defendant's wait lists. Mr. Ward, as a person with
10:22:40 mental illness, has picked up criminal charges at least twice
10:22:44 and has been found incompetent on each of these charges,000
10:22:47 spending time on Defendant's wait lists each time.
10:22:50 Mr. Jones, on the other hand, is an example of the

other possibility, where a person found incompetent to stand trial finally goes to the hospital, is restored, returns to jail, and loses competency in that environment so that he is again found incompetent to stand trial and finds himself back on Defendant's wait lists.

Finally, Ms. Sapp was found incompetent to stand trail, and when she returned to court was acquitted NGRI. She exemplifies the possibility of the incompetency detainee class to become members of the second NGRI class and wait again on Defendant's wait lists.

These three named plaintiffs have a real interest in avoiding another lengthy wait in jail while on Defendant's wait lists, as do their fellow named class members who may find themselves in the same positions as Mr. Ward, Mr. Jones, or Ms. Sapp.

Courts have found class representatives to be adequate even when their individual claims have resolved. It is the law of the case that Plaintiffs' claims are inherently transitory, and it is the hallmark of an inherently transitory claim that it will resolve before litigation can conclude that would address the violation.

In this case the inherently transitory nature of Plaintiffs' claims mean that they have individually resolved not only before the case could be decided, but before class certified. For inherently transitory claims, and for

Plaintiffs' claims specifically, under the Fifth Circuit ruling the class certification order relates back to the filing of the complaint.

There is abundant court precedent for granting class certification and finding adequacy of named representatives in cases brought by named plaintiffs whose individual cases have resolved. Like the Supreme Court in *Sosna v. Iowa*, a case brought to challenge state laws regarding who could file for divorce. Though she had long since satisfied the jurisdictional requirement and obtained her divorce, the court found Ms. Sosna to be an adequate representative.

In *Gerstein v. Pugh*, a case brought by pretrial detainees whose confinements could not be ascertained at the outset, but whose claims would all certainly expire by the time class litigation resolved, named members were adequate.

And in *Coll v. Hyland*, a man whose mental health civil commitment had expired, yet he was an adequate representative of the class challenging the commitment procedures in New Jersey.

Each of the named plaintiffs is also represented by next friends who share a current interest in having Defendant's constitutional violations cease. In the Fifth Circuit a next friend can represent a named plaintiff who, because of age or mental disability, is unable to adequately represent his or her own interests in litigation and can be an adequate class

representative.

In this case the named plaintiffs are represented by next friends, each of whom served as the criminal defense attorney for their respective plaintiff. As attested to in each of their sworn declarations, the next friends have over 137 combined years experience representing criminal defendants, including hundreds of individuals found incompetent to stand trial and numerous NGRI acquittees.

Plaintiff Ward's next friend, Dr. Floyd Jennings, was previously chief of the Mental Health Public Defender's Office for Harris County and has published over 35 papers in the area of mental health and law. Before becoming a lawyer, he obtained his Ph.D. in clinical psychology and, for 20 years, was a clinical faculty member of the University of Texas Medical School at Houston.

The next friends for Plaintiffs Lawson, Lampkin, and Adickes, Criminal Defense Attorneys Krista Chacona and Elsie Craven have many years of experience representing criminal defendants with mental illness.

Plaintiff Kenneth Jones is represented in the suit by Patricia Sedita, a criminal defense attorney in private practice who has so much experience representing incompetency detainees and NGRI acquittees that she is a local resource for other attorneys.

Lourdes Rodriguez, next friend for Plaintiff

10:26:50 Mary Sapp, who was found both incompetent to stand trial and
10:26:53 NGRI, worked for nearly a decade in community mental health in
10:26:58 Florida before becoming an attorney. Most of her clients now
10:27:01 come from the Harris County Mental Health Restoration Court for
10:27:05 individuals found incompetent to stand trial.
10:27:07 And, finally, Plaintiff Julian Torres is represented
10:27:10 in this suit by Melissa Shearer, the head of the Travis County
10:27:14 Mental Health Public Defender, an office where she has
10:27:17 dedicated the last 12 years of her career to representing
10:27:20 defendants with mental illness.
10:27:22 Case law in the Fifth Circuit is clear that a next
10:27:25 friend representing a named plaintiff who, because of age or
10:27:28 mental disability, is unable to adequately represent his or her
10:27:32 own interests in litigation, can serve as a class
10:27:35 representative. This is clear in the *Horton* case cited by
10:27:40 Defendant as well as in *M.D. v. Perry*, the Texas foster case.
10:27:45 In *M.D.*, the foster children's next friends were
10:27:48 their attorneys ad litem, the attorneys appointed in the
10:27:51 underlying individual child welfare cases to represent the
10:27:55 interests of the children. The Fifth Circuit found that the
10:27:58 children's next friends were adequate representatives after,
10:28:01 quote, considering the individual's familiarity with the
10:28:05 litigation, the reasons that move her to pursue the litigation,
10:28:09 and her ability to pursue the class on the impaired class
10:28:13 members' behalf.

10:28:14 Thus, much like the next friends in *M.D.*, Plaintiffs' next friends are the attorneys appointed to represent the named plaintiffs in their underlying criminal cases. They are familiar with the litigation, with the problem of HHSC's self-imposed insufficient forensic bed capacity, and with the harms caused to Plaintiffs and future plaintiffs by this practice. They are motivated and able to pursue the case on the named plaintiffs' behalf, and they have an ongoing interest in seeing the long wait list shortened for their future clients.

10:28:46 Defendant has offered nothing to contradict this evidence and has simply and bizarrely argued that there is no legal relationship between the criminal defendants and their court-appointed counsel, in contrast to the legal relationship between a foster child and their court-appointed counsel.

10:29:01 Taken to its logical end, Defendant would have this Court order that no class action could ever be certified on behalf of a vulnerable population who is incapable of representing themselves, an outcome that is belied by the plethora of class action cases brought by next friends and Rule 17(c) itself.

10:29:17 Finally, looking to class counsel, the named plaintiffs are represented in this lawsuit by attorneys from Disabilities Rights Texas and Winston & Strawn LLP. Defendants have not challenged the credentials or qualifications which are

10:29:32 detailed in the declarations of Beth Mitchell, Peter Hofer, and
10:29:36 John Michael Gaddis, attached as exhibits to Plaintiffs' motion
10:29:39 for class certification.
10:29:40 What defendants have asserted, however, is the
10:29:44 outlandish argument that, because Disability Rights Texas's
10:29:46 mission as a nonprofit law firm includes protecting and
10:29:49 advocating for the rights of individuals with mental illness,
10:29:52 which would include individuals in state hospitals on civil
10:29:55 commitments, that we are conflicted from representing the named
10:29:59 plaintiffs here.
10:30:00 Defendant has cited no case law even remotely on
10:30:03 point for the suggestion that a hypothetical conflict with
10:30:06 unspecified persons whom we do not represent in any litigation
10:30:09 can preclude class certification. Instead, citing the *Krim*
10:30:15 case, where the attorneys were currently litigating multiple
10:30:19 class action suits on behalf of individuals whose interests
10:30:22 might conflict and the attorneys had not informed any of the
10:30:26 clients about the other cases, the settlement offers, or
10:30:28 negotiations, which led to the appearance that some classes
10:30:32 were being favored over others.
10:30:34 Unlike the attorneys in *Krim*, Disability Rights Texas
10:30:37 has not filed a lawsuit on behalf of any other population,
10:30:40 though Defendant's reports to the Legislature provided in
10:30:44 Exhibit Q show that there are actually people on the wait list
10:30:47 for civil commitments.

10:30:48 It is rich for Defendant to suggest that Plaintiffs
10:30:51 are conflicted because they serve both forensically and civilly
10:30:54 committed individuals when HHSC is the one charged by state law
10:30:59 with timely providing mental health services to both, a duty
10:31:03 they are currently failing at with respect to forensic
10:31:06 committed individuals.
10:31:08 Contrary to Defendant's claims, Plaintiffs have not
10:31:11 asked the Court to impose a remedy that would expand the number
10:31:15 of beds for forensically committed individual at the expense of
10:31:19 nonforensic admissions. All Plaintiffs have asked is that the
10:31:23 Court set a time limit for how long class members can
10:31:26 constitutionally remain confined without the services that are
10:31:29 the legislatively mandated purpose of their confinement and
10:31:32 leave it up to Defendant how HHSC can meet its legal
10:31:35 obligations to both forensic and nonforensic individuals.
10:31:38 THE COURT: Let me ask you a question there.
10:31:40 MS. SNEAD: Yes, Your Honor.
10:31:43 THE COURT: You ask the Court to set a time limit on
10:31:46 how long the -- if classes are certified the class members can
10:31:49 be held?
10:31:50 MS. SNEAD: Yes, Your Honor.
10:31:51 THE COURT: Suppose the Court does that.
10:31:54 MS. SNEAD: Yes.
10:31:55 THE COURT: And suppose the Court -- and the time
10:32:00 limit passes. What action occurs then? Do the people get

10:32:05 1 released from confinement altogether, or are they held in some
10:32:10 2 temporary facility? We have to look to see what would occur if
10:32:18 3 this Court renders an order and, for whatever reason, is not
10:32:22 4 complied with by the State.
10:32:24 5 MS. SNEAD: I think at that point, Your Honor, we
10:32:26 6 would move to find the State in contempt. As I'll explain
10:32:30 7 shortly --
10:32:30 8 THE COURT: What happens to the individuals? That's
10:32:32 9 what I'm concerned with, not what the next legal action would
10:32:36 10 be. But let's suppose, rightly or wrongly or justly or
10:32:40 11 unjustly or because of lack of financing or lack of action by
10:32:45 12 the Legislature, an order of this Court that is final and
10:32:50 13 unappealable is not carried out. I understand the legal
10:32:56 14 ramifications of that and what you might do and what this Court
10:33:00 15 might do. But in the practical world, what happens to the
10:33:04 16 individual once the time expires?
10:33:07 17 MS. SNEAD: So in the case of the incompetency
10:33:10 18 detainees, under 46B.05, when an incompetency detainee is
10:33:17 19 ordered into an HHSC mental health facility, they're ordered
10:33:19 20 into the custody of the sheriff for transportation. So they
10:33:22 21 would remain in the custody of the sheriff; they would remain
10:33:25 22 in jails. And so then, of course, as you noted, their
10:33:29 23 substantive due process rights would -- the violation would
10:33:31 24 occur, but, no, they would not get out. Their criminal court
10:33:36 25 orders order them to be held pending transfer to an HHSC mental

10:33:39 health facility, and those individual court orders --
10:33:42 THE COURT: So those orders remain in effect.
10:33:44 MS. SNEAD: Yes.
10:33:44 THE COURT: The individual's status doesn't change. And that's when we come back into court and determine what we're going to do on a potential contempt motion or what you have.
10:33:52 MS. SNEAD: Yes, Your Honor.
10:33:52 THE COURT: Okay. Thank you.
10:34:05 MS. SNEAD: To conclude for adequacy, as with their baseless argument regarding next friends, taken to its logical end, finding that a nonprofit has a conflict of interest anytime it brings a lawsuit on behalf of only one population it serves would essentially close the door to class actions being brought on behalf of indigent and vulnerable populations by nonprofit law firms. This cannot be the case.
10:34:28 The named plaintiffs, their next friends and the class counsel are all adequate and have no conflicts of interests that would prevent them from zealously seeing this case through. Both classes have, therefore, satisfied their requirements as to adequacy.
10:34:43 Finally, both classes of plaintiffs have brought this action under b(2), the key to which, according to the Fifth Circuit in this case, is the indivisible nature of the injunctive or declaratory remedy warranted, the notion that the

10:34:58 conduct is such that it can be enjoined or declared unlawful
10:35:00 only as to all of the class members or to none of them.
10:35:03 Citing *Yates*, the Fifth Circuit recognized three
10:35:08 elements that informed the rule 23(b)(2) certification. First,
10:35:12 that class members have been harmed in essentially the same
10:35:14 way; second, that injunctive relief predominates over monetary
10:35:19 damage claims; and, third, the injunctive relief must be
10:35:22 specific.
10:35:23 Applying these to Plaintiffs' proposed classes, the
10:35:27 evidence establishes that Defendant has acted or refused to act
10:35:30 in the same way to the classes as a whole. Defendant has
10:35:33 failed or refused to provide sufficient capacity at its mental
10:35:37 health facilities to timely provide the competency restoration
10:35:41 examination and services or the NGRI evaluation and treatment
10:35:45 that are the sole purposes of the incompetency detainees' and
10:35:49 NGRI acquittees' continued confinement.
10:36:04 As I established in detail previously, these actions
10:36:09 or refusals on the part of Defendant have grievously harmed,
10:36:11 and will harm, the liberty interest in criminal cases of the
10:36:14 members of the incompetency detainee class. The NGRI class has
10:36:19 also suffered harm, and will suffer harm, to their liberty
10:36:22 interest as a result of Defendant's actions or refusals.
10:36:25 The injunctive relief sought by Plaintiffs for each
10:36:29 proposed class is both reasonable and specific, insofar as it
10:36:33 would simply require Defendant to admit class members to its

10:36:36 mental health facilities with a specified time frame -- 21 days
10:36:40 or 14 days, respectively -- after HHSC is notified of their
10:36:44 being found either incompetent to stand trial or not guilty by
10:36:48 reason of insanity.

10:36:50 Indeed, history shows that the injunction Plaintiffs
10:36:55 have prayed for will work. Looking to this chart produced by
10:36:55 Defendant and included as Exhibit M in Plaintiffs' motion, the
10:36:59 overall upward trajectory of both waiting lists over the last
10:37:04 10 years has been interrupted by two temporary decreases in the
10:37:07 number of individuals waiting for a bed in an HHSC mental
10:37:11 health facility. These decreases correspond to time periods
10:37:14 when Defendant took deliberate steps to reduce the waiting
10:37:17 lists.

10:37:18 This chart, Exhibit P, shows a smaller snapshot of
10:37:23 time. This is the list from December 2010 through
10:37:27 December 2014. This is the chart as Defendant produced it, and
10:37:31 you can see that in December 2011, HHSC made a deliberate plan
10:37:36 to reduce the wait list to 21 days or less. This is the line
10:37:41 second from the left. You can also see that on the right-hand
10:37:45 side of the chart, towards the middle of 2014, the wait list
10:37:49 begins to go sharply back up.

10:37:51 Here is the same chart, except that Plaintiffs have
10:37:54 added three lines that correspond to the *Taylor v. Lakey*
10:37:57 litigation in state court. The first line corresponds to the
10:38:01 district court hearing in November 2011. It was immediately

after this hearing that, according to its own line, Defendant began to reduce the wait list.

The second line corresponds to Judge Naranjo issuing a final judgment against Defendant in February 2012. At that time Judge Naranjo ordered the defendant to abide by essentially the same injunction the incompetency detainee plaintiffs in this case have prayed for: The defendant cannot fail to make a bed available to an incompetency detainee later than 21 days from receipt of the court order.

A little more than two years later, on May 12th, 2014, the Texas Third Court of Appeals overruled Judge Naranjo's final judgment on a procedural matter. As I noted before, after the line representing the Third Court of Appeal's ruling on the right, you see the right-hand side of the chart almost immediately go back up. Generally speaking, the faster Defendant's wait lists are moving, i.e., the less time people wait for a bed in an HHSC mental health facility, the fewer people overall wait.

So, while Defendant denies the drop in the wait list was caused by the *Lakey* order, the decreases of the number of people waiting on the wait lists between February 2012 through May of 2014 on this chart correspond to the time periods that Defendant identified in its responses to the 2017 interrogatories as the time it just so happened that it was admitting detainees and acquittees to its mental facilities

10:39:36 within 21 days.

10:39:37 Returning to the first chart, after 2014, the wait
10:39:41 list began to grow again until, after months of attempting to
10:39:45 resolve the high wait list times again without litigation,
10:39:48 Plaintiffs filed this case on July 19th, 2016. At that time
10:39:54 persons on the clearinghouse wait list waited an average of
10:39:57 41 days, which was a decrease from several months prior, though
10:40:01 still nearly twice the 21-day limit proposed by Plaintiffs.

10:40:05 The evidence, specifically the responses to the 2017
10:40:09 interrogatories and Associate Commissioner Bray's deposition
10:40:13 testimony, shows that within a month of Plaintiffs filing this
10:40:16 suit in August of 2016, HHSC was again able to ensure that
10:40:21 persons committed to a non-MSU HHSC forensic bed waited less
10:40:26 than 21 days on its clearinghouse wait list.

10:40:29 An injunction requiring defendant admit to the
10:40:31 incompetency detainees to one of its mental health facilities
10:40:35 within 21 days of receipt of the criminal court's order would
10:40:39 provide systemic relief to each member of that class.
10:40:44 Likewise, an injunction requiring Defendant admit NGRI
10:40:46 acquittees to one of its mental health facilities within
10:40:49 14 days of receipt of the criminal court's order would provide
10:40:52 systemic relief to each member of that class.

10:40:55 Plaintiffs propose time limits therefore satisfy
10:40:58 concerns raised by the Fifth Circuit regarding the prior class
10:41:02 certification order, which it found to be ambiguous because the

order did not define, quote, what period of time the district court considers to be extended.

Now, whether 21 or 14 days is the ultimate time limit established at the end of the case is a question for the merits. But, as history established in the *Lakey v. Taylor* case, 21 days is an attainable deadline for Defendant. HHSC has twice proven that it can take detainees within 21 days and, when it did so, it cured the substantive due process violations of the incompetency detainees.

Contrary to Defendant's assertion, since Defendant admits each class on a first-come, first-served basis, there is no need for different injunctions or declaratory judgments tailored to different individual class members, as a single injunction and declaratory judgment for each class provides an appropriate remedy for all members.

In support of this proposition, though, Defendant cites a conditions case that would have required relief tailored to individual hospital patients. However, just because a case concerns a hospital does not mean that the required relief must be individually tailored.

Several courts in Oregon, Louisiana, and Washington have been able to craft precisely the injunction that Plaintiffs here seek, despite the fact that those claims also concerned the admission of jail detainees to state hospitals.

Similarly, courts in Texas have not found the Texas

foster care system that serves over 12,000 children in *M.D. v. Perry*, nor the Texas Medicaid system for thousands of individuals with intellectual disabilities in nursing homes in *Steward v. Janek*, to be too large for a single injunction to work.

Classes like the one proposed here are precisely the kind intended by Rule 23(b)(2) which is often used to vindicate the civil rights of vulnerable groups. Indeed, courts in Utah and Washington have within the past five years certified classes under Rule 23(b)(2) for classes nearly identical to those of the IST class. Both courts found that proposed classes meet the requirements of rule 23(a) and Rule 23(b)(2), as should this court as well.

In sum, unless the court has any further questions, Plaintiffs have carried their burdens under Rule 23 to certify the proposed classes for the incompetency detainees and the NGRI acquittees.

Named Plaintiffs, therefore, ask the Court to certify the two classes to name Joseph Ward, Mark Lawson, Jennifer Lampkin, Kenneth Jones, Mary Sapp, and Julian Torres through their next friends as class representatives of the incompetency detainee class; to name Mary Sapp and Cecil Adickes through their next friends as class representatives of the NGRI class; and to appoint Disability Rights Texas and Winston & Strawn as class counsel.

10:43:52 Plaintiffs reserve their remaining time for rebuttal.

10:43:55 THE COURT: Thank you, Ms. Snead. I have no further
10:43:58 questions at this time.

10:43:59 MS. SNEAD: Thank you.

10:44:01 THE COURT: Defendant may proceed.

10:44:11 And, Mr. Abrams, you'll have about 30 minutes, and
10:44:14 then we're going to break.

10:44:14 MR. ABRAMS: I think we'll be done in 30 minutes,
10:44:17 Your Honor.

10:44:17 THE COURT: Well, that will be a convenient time to
10:44:19 break, then.

10:44:19 MR. ABRAMS: Perfect.

10:44:21 Good morning, Your Honor. Because the plaintiffs
10:44:23 finished their presentation with the discussion of the Rule
10:44:26 23(b)(2) remedy, I thought it would make sense to start there
10:44:29 and, after discussing that, we'll move into the Rule 23(a)
10:44:33 factors.

10:44:35 And, as with our briefing, the bulk of our argument
10:44:37 in the Rule 23(a) analysis focuses on commonality, specifically
10:44:41 here, the idea that Plaintiffs are asserting as-applied
10:44:44 substantive due process claims that require a case-by-case
10:44:48 approach that does not lend itself to resolution on a
10:44:51 class-wide basis.

10:44:53 I'd like to start with the evidence that the Court
10:44:57 just heard and, importantly, what the Court did not hear. At

10:45:01 1 no point in their presentation did Plaintiffs put on any
10:45:04 2 evidence or even allege that the state hospitals are not
10:45:09 3 providing exceptional services to their patients, which include
10:45:12 4 both forensic commitments, civil commitments, and voluntary
10:45:17 5 commitments.
10:45:18 6 The nine state hospitals, including one right here in
10:45:21 7 Austin, do wonderful work to serve these critical populations,
10:45:24 8 and Dr. Faubion's declaration, which is Exhibit B to our
10:45:28 9 response, goes into detail about the varied mental health
10:45:31 10 services that the hospitals provide. We treat patients with
10:45:35 11 mental illness, patients with intellectual disabilities,
10:45:38 12 patients who need to be restored to competency, patients who
10:45:42 13 are facing a psychiatric crisis, and others.
10:45:45 14 This case is not about inadequate services or in any
10:45:48 15 way about the refusal to provide services. It is instead about
10:45:53 16 the equitable allocation of the state hospital services and
10:45:57 17 resources to a lot of folks who need them. And on that front
10:46:04 18 HHSC is not unaware. In fact, HHSC is very aware of the issues
10:46:08 19 that Plaintiffs raise today, and that is why HHSC has taken
10:46:12 20 multiple, significant steps to reduce admission wait times,
10:46:16 21 both now and into the future, both for the clearinghouse and
10:46:20 22 the MSU wait list.
10:46:22 23 And some of those steps include -- and this is at
10:46:24 24 paragraph 11 in Timothy Bray's declaration -- reconfiguring
10:46:30 25 capacity at the maximum security unit hospital at North Texas

State Hospital to increase the number of persons with multiple disabilities served; establishing a 16-unit bed at Kerrville State Hospital; establishing a new 20-unit bed at Terrell State Hospital to serve forensic patients who have served in the Armed Forces; aggressive recruitment and staffing strategies.

And on that point, as Tim Bray noted in his declaration, some of our hospitals are in rural areas, which can propose a problem for recruitment. And so we're implementing the most aggressive strategies we can to recruit and retain talent.

The Legislature, importantly, has appropriated funds for a 70-bed maximum security unit at Kerrville State Hospital, 60 additional maximum security unit beds at Rusk State Hospital, and a 40-bed expansion at the San Antonio State Hospital.

Finally, the state hospital system is complex, and it's not just about more beds. To that end, HHSC is currently implementing Senate Bill 562 which passed in the last legislative session. And what Senate Bill 562 does is it gives HHSC more discretion in sending folks to an MSU facility or non-MSU facility.

So, as Plaintiffs' evidence demonstrated, the most significant wait times are with respect to the MSU list. The clearinghouse list, which is for the hospitals that serve non-MSU-bound patients generally moves a lot faster. And part

10:48:03 of the problem was that, under the prior version of the law,
10:48:07 HHSC had no clinical discretion to decide whether someone
10:48:11 should go to a maximum security unit or a non-maximum security
10:48:14 unit.

10:48:15 If someone was charged with an enumerated offense,
10:48:18 they were going to a maximum security unit. And that wasn't
10:48:19 always necessary, because there could be times where someone
10:48:22 was not -- a clinician could determine that someone wasn't
10:48:25 dangerous and didn't need the extra security of a maximum
10:48:28 security unit. Now HHSC has discretion to send someone to a
10:48:32 non-maximum security unit, if that's what a clinician
10:48:38 determines is appropriate.

10:48:40 And so what that does, or what we hope it will do, is
10:48:43 reduce the wait times on the maximum security unit list, which
10:48:45 is primarily what we interpret Plaintiffs' claims to be about.
10:48:49 I mean, they argue that this is about the clearinghouse and the
10:48:51 maximum security unit list, but this is really -- you know, the
10:48:55 way that they have pleaded and argued this case, this is really
10:48:58 about the maximum security units.

10:49:00 Now, Your Honor, all this goes directly to the
10:49:03 Rule 23(b)(2) analysis. Plaintiffs have argued that they have
10:49:06 proposed specific time limits, and so that's enough to satisfy
10:49:11 their burden under Rule 23(b)(2). And, by the way, it's worth
10:49:15 noting that those time limits are different with respect to
10:49:18 MSU -- or with respect to incompetent detainees and those found

not guilty by reason of insanity, and it's difficult to square that with a single constitution.

But they don't explain how those time limits could be imposed, justified, or effective at remedying the diverse harms suffered by the class members. Plaintiffs argued just now that it is simple, that they are asking for a simple injunction. It would not be simple to comply with the injunction that the plaintiffs propose.

The Fifth Circuit instructed the plaintiffs to put forward injunctive relief that is specific and that describes in reasonable detail the acts required, and they claim to have done so with their 21-day and 14-day time frames. But, again, it is undisputed that HHSC is providing excellent services, and so Plaintiffs haven't explained how that injunction would work in practice.

Would it mean, as they appear to imply that they are -- would like, to convert the entire state hospital system into a forensic-only system, at the exclusion of several commitments and voluntary commitments? Would it mean moving patients from maximum security units to non-maximum security units even though HHSC has determined that they are most appropriately served and, for the safety of both themselves and the staff, they need to be at maximum security units?

We cannot ask doctors to speed up care to make room for others. Treatment --

10:50:49 THE COURT: So what do we do? We've got a situation
10:50:55 where a district judge has determined that an individual needs
10:51:03 treatment as opposed to additional punishment and that that
10:51:09 treatment comes in one of the three places, as outlined by the
10:51:14 Plaintiff. If a jail has it, fine; if there's private care
10:51:23 available, fine; but most of it goes to HHSC.
10:51:29 I'm concerned about whether your argument is there's
10:51:38 just nothing that can be done but leaving the people in jail
10:51:41 regardless of the state court's order for whatever period of
10:51:47 time, the dates that we've heard here today and that are in the
10:51:52 proof that supports the request and the response.
10:51:57 Is your argument that we don't certify the class and
10:52:02 we just leave everything the way it is because, regardless of
10:52:06 what the statute says, we're doing the best we can do?
10:52:09 MR. ABRAMS: A couple of responses to that,
10:52:11 Your Honor. The first is that we don't control the district
10:52:14 courts who have ordered the individuals into treatment. So it
10:52:20 could be -- you know, so we don't control whether they're
10:52:23 released on bail or not. That is just something -- I think the
10:52:26 plaintiffs were arguing this is a confinement case, but we are
10:52:29 not confining the plaintiffs.
10:52:31 THE COURT: No, you're not. In fact, you're not even
10:52:33 there yet.
10:52:34 MR. ABRAMS: That's correct.
10:52:35 THE COURT: Because you don't -- they haven't come to

you yet.

MR. ABRAMS: Exactly, Your Honor. And so we are also not saying that there is no possible remedy. What we're saying is actually what the Third Court of Appeals did in the prior version of this case. And it's actually a little bit of a different issue because that involved a facial challenge rather than, sort of, the class action issue here.

But what the Third Court of Appeals did with respect to the same first-come, first-served policy is say: This is not facially unconstitutional. It could be unconstitutional, you know, as applied, depending on the circumstances, which we don't dispute. Under *Jackson* we don't dispute that there could become a point at which there's a constitutional harm. But what we're saying is that this case is not amenable to the specific relief that the plaintiffs are asking for here, which is resolution of this on a class-wide basis with a single injunction.

THE COURT: But how else do you get the issue before a court? If the Legislature has said, once a district court rules, this has to be done, how do we solve the problem of, let's take the extreme, the 439 days before anything is done? That's over a year. Is your position that we've got to keep doing it the way we're doing it because there is no way to solve the problem?

MR. ABRAMS: Again, several responses, Your Honor.

10:54:03 Some plaintiffs have pursued habeas relief. So that is one
10:54:07 option that some plaintiffs have -- have done. The second
10:54:12 option is, again, they can bring an as-applied challenge to
10:54:15 their specific claim, and they'd likely have support from the
10:54:19 Fifth Circuit on the argument about inherently transitory
10:54:23 claims there if they were to bring that claim in the future.
10:54:28 But the third thing, Your Honor, is that we are not
10:54:30 saying that we are just, you know, going to keep with the
10:54:35 status quo. And that's why it was really important to go
10:54:38 through the specific acts that Tim Bray discussed in his
10:54:45 declaration. And really what this is about, Your Honor, is a
10:54:48 complicated state hospital system that has to take into account
10:54:51 a lot of different factors.
10:54:52 So, for example, right now forensic patients take up
10:54:56 about 65 of the state hospital beds. And contrary to what
10:54:59 Plaintiff said, that's not -- that's not ironclad. It can
10:55:04 fluctuate depending on HHSC's discretion. And about 35 percent
10:55:08 are reserved for civil commitments.
10:55:11 If you increase the forensic capacity, you're
10:55:18 necessarily decreasing the capacity for civil commitments. And
10:55:22 so what we're saying is that HHSC is in the best position to
10:55:26 determine how to allocate its resources to deal with, you know,
10:55:33 this issue that there are a limited number of beds at the
10:55:36 moment.
10:55:37 And then the other thing is that the Legislature has

10:55:39 1 also recognized that we can build more beds to eventually drive
10:55:43 2 the wait times down. But with respect to building more beds,
10:55:46 3 especially with respect to maximum security units where you
10:55:50 4 have to build a security apparatus enough to secure all the
10:55:53 5 patients and the staff, that just takes time. I mean, building
10:55:56 6 a hospital, putting the staffing in place, getting it up and
10:56:01 7 running, that just takes time. And so what the plaintiffs are
10:56:04 8 asking for is what HHSC is already doing. And the issue is
10:56:08 9 just that it takes time to make these concrete steps that will
10:56:14 10 work in the long term.
10:56:15 11 And so for all these reasons, Your Honor, there are
10:56:24 12 serious problems with the Rule 23(b)(2) remedy that they
10:56:27 13 propose. Now, the Fifth Circuit in *Yates v. Collier* emphasized
10:56:32 14 that there have not been a lot of cases dealing with the
10:56:35 15 specificity requirement, so there aren't a lot of cases in the
10:56:38 16 Fifth Circuit that explain how specific is specific enough.
10:56:42 17 But we'd argue that you have to look at the individual case and
10:56:46 18 determine from there whether the proposed remedy is specific
10:56:49 19 enough. And here we would argue they haven't done that, given
10:56:53 20 that there is no argument that we are not providing outstanding
10:56:57 21 services and given the complexity of the state hospital system.
10:57:03 22 With that, Your Honor, I'd like to move into the
10:57:11 23 Rule 23 factors -- Rule 23(a) factors, rather. In its
10:57:15 24 responsive brief, we devoted most of our briefing on
10:57:17 25 commonality, and so I'd like to start there.

10:57:20 To satisfy this requirement, the class members' claims must turn on a common contention that is capable of class-wide resolution, which means that determination of its truth or falsity will resolve an issue essential to the validity of each of the claims in one stroke. What matters for class certification is the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.

10:57:45 The Fifth Circuit instructed in its opinion that the court must examine commonality with an eye towards the claims, defenses, relevant facts, and the substantive law as part of its rigorous analysis. And so here that means that the Court must at least consider the nature of the plaintiffs' claims to determine whether they are capable of class-wide relief. And here they are not.

10:58:10 We have to start with the claim that they have pleaded. In one sense, this is a straightforward case. They are alleging a substantive due process claim under the Fourteenth Amendment that, based on *Jackson v. Indiana*, that the nature and duration of their commitment does not bear some reasonable relation to the purpose for which the individual is committed.

10:58:30 And so, as Plaintiffs' recognize, that means that the case that we start with in our analysis is *Jackson v. Indiana*. And in *Jackson*, which dealt with a plaintiff who was being

10:58:40 detained and was unlikely to ever be restored to competency,
10:58:43 the court held that, at the least, due process requires that
10:58:47 the nature and duration of commitment bears some reasonable
10:58:50 relation to the purpose for which the individual is committed
10:58:54 and, shortly after that, that he cannot be held more than a
10:58:58 reasonable period of time necessary to determine whether there
10:59:01 is a substantial probability that he will obtain that capacity
10:59:06 in the foreseeable future.
10:59:07 Twice, in back-to-back paragraphs, the court used the
10:59:13 word "reasonable." The touchstone of the analysis is
10:59:17 reasonableness. And the court declined to prescribe arbitrary
10:59:21 time limits, citing a lack of evidence in the record and the
10:59:25 existence of differing state facilities and procedures.
10:59:28 THE COURT: Well, was *Jackson* talking about the time
10:59:35 period after treatment started or the time period of a delay
10:59:41 before the court-ordered treatment ever started?
10:59:44 MR. ABRAMS: In *Jackson* it was the end of the
10:59:46 process, where they were already in the state system. And this
10:59:49 is admittedly at the beginning of the process. And to that
10:59:52 point --
10:59:57 THE COURT: See, I see distinct different between
11:00:00 continuing to hold persons in jails without treatment before
11:00:05 they start getting the treatment that the court has ordered.
11:00:09 That's my concern, is that period of time.
11:00:11 MR. ABRAMS: Yes, Your Honor. And I think on that

point, that is something that the *Powell* court, which is out of Maryland which, again, you know, we concede it's not binding authority, but it's certainly helpful and probably the most thorough opinion in addressing *Jackson* as it applies to these type of situations. The *Powell* court recognized that *Jackson* involved the end of the process, whereas, you know, that case and this one involved the beginning of the process. But *Powell* nonetheless recognized that that same standard applies, as the plaintiffs appear to recognize.

So what the *Powell* court did is identify several considerations as to when a plaintiff has a substantive due process claim and when a delay is reasonable or not. And that includes the nature of the defendant's disorder, the circumstances of the defendant's confinement at the pretrial detention facility, and the treatment needs of the defendant.

And what the Maryland court recognized is that these types of claims, very similar claims as to what the plaintiffs are bringing here, are ill suited to a one-size-fits-all approach, which necessarily means they are ill suited to class-wide resolution. And so if this Court is to interpret *Jackson* in the way that *Powell* interprets and in the way that we argue is the only correct way to interpret that case, when a delay violates the due process clause will depend on the individual circumstances, including whether they are receiving stabilizing medication in jail.

11:01:40 And here I think it's important to turn to the
11:01:43 analysis in *Jackson*, which focused on the -- that the duration
11:01:50 of the commitment must bear a reasonable relation to the
11:01:53 purpose for which the individual is committed. And that
11:01:56 doesn't necessarily have to be exactly the same thing as what
11:01:58 is stated under state law.
11:02:00 And so Dr. Faubion, who is the chief of forensic
11:02:03 medicine at HHSC, testified that the majority of forensic
11:02:07 patients who are adjudicated not competent to stand trial are
11:02:11 restored with treatment of their mental illness using
11:02:14 medication. He also testified that, in his professional
11:02:17 experience, he has seen patients already restored to competency
11:02:21 through the provision of prior medical services.
11:02:24 Now, it's true that not all -- not all individuals
11:02:29 being held in jail are going to be receiving psychotropic
11:02:32 medication. They're not all going to be receiving that
11:02:35 medication at the appropriate dosages. They might not all be
11:02:37 receiving them for the appropriate amount of time.
11:02:40 But some -- some detainees will be. And that's
11:02:45 what's important for purposes of the case at this juncture,
11:02:47 which is that, for class-wide resolution, you to have common
11:02:52 questions of law and fact that can be answered in one swoop.
11:02:56 And the fact that some plaintiffs are going to be receiving
11:02:59 medication in jail that puts them on the pathway to restoration
11:03:05 negates commonality.

11:03:08 And, Your Honor, on that point I would like to shift
11:03:11 to or at least discuss the other cases that the plaintiffs
11:03:14 cite. So Plaintiffs cite two cases that certify similar
11:03:21 classes, but both are very distinguishable. In the case out of
11:03:25 Utah, the court barely cited *Jackson* and didn't have the same
11:03:28 evidentiary record that the Court has before it today.
11:03:30 And in the Washington case the parties stipulated to
11:03:32 the -- to the agreed class, which the Fifth Circuit has said
11:03:37 that the court has to conduct a rigorous analysis even if the
11:03:41 parties don't challenge anything, which is why the plaintiffs
11:03:44 have to put on evidence of adequacy of their counsel even
11:03:46 though we didn't specifically challenge that.
11:03:48 And so those two cases actually don't support the
11:03:50 argument that these claims are amenable to class-wide
11:03:54 resolution.
11:03:54 In fact, the two arguably most analogous cases are
11:04:01 from state courts, the *Powell* case and the *Lakey* case. The
11:04:03 *Powell* case stands for the proposition that the reasonableness
11:04:06 approach precludes a one-size-fits-all analysis, and the *Lakey*
11:04:10 case stands for the proposition the one -- the first-come,
11:04:17 first-served policy is not facially unconstitutional.
11:04:22 And so we'd argue that, if there's any case law out
11:04:23 there that's close on point, it actually supports HHSC's
11:04:26 position with respect to the current posture of the case that
11:04:30 we're in now.

11:04:31 Finally, I'd like to note that the standard of review
11:04:36 here matters and is an additional factor in demonstrating that
11:04:40 this case cannot be resolved on a class-wide basis.
11:04:44 Plaintiffs intend to make this a conditions of
11:04:46 confinement case, but this case is not about the conditions
11:04:49 that the plaintiffs are being held in jail in the traditional
11:04:53 sense and in the traditional way that those claims are brought.
11:04:56 They have not sued or brought in any of the jails as part of
11:05:00 their claims.
11:05:01 And so what this case is more appropriately governed
11:05:04 by is the shocks-the-conscience standard, which requires an
11:05:09 individualized inquiry into whether the government has been
11:05:11 deliberately indifferent to a known risk to the victim's health
11:05:15 and safety, which is something that can only be determined on a
11:05:18 case-by-case basis because it necessitates consideration of
11:05:22 each detainee, their circumstances, and HHSC's actions in
11:05:25 relation to those circumstances.
11:05:27 And, finally, I just have one final note on the
11:05:36 first-come, first-served policy: It does generally apply to
11:05:40 incompetent detainees, with some limited exceptions, but NGRIs
11:05:44 are given priority to comport with Texas law. So, to the
11:05:47 extent that this is a case about the first-come, first-served
11:05:50 policy, which is how the Fifth Circuit understood Plaintiffs to
11:05:53 be bringing their claims, the NGRI class is not even subject to
11:05:58 that policy in the same way that the incompetent detainees are,

because they are given priority in order comport with Texas law.

For all these reasons, Plaintiffs have not met their burden of establishing common questions of law and fact that can be resolved on a class-wide basis.

THE COURT: Thank you.

MR. ABRAMS: I'm going to address typicality.

THE COURT: All right. Go ahead and address typicality.

MR. ABRAMS: Well, with respect to typicality, we don't have a lot more to say because the typicality analysis typically merges with commonality. And here there are no common claims for the reasons that we've already argued, so Plaintiffs claims cannot be typical of the class. And, in any event, the named plaintiffs -- with one exception, Julian Torres -- were all committed to a maximum security unit with a longer wait time than the majority of the class members who have been committed to non-maximum security units.

The next area I'd like to focus on is the numerosity requirement which we only address with respect to the NGRI class even though Plaintiffs correctly note that the Court must conduct a rigorous analysis with respect to both classes.

Among the factors that the Court must consider include the class size, the geographic diversity of class members, the ease or difficulty of identifying class members,

11:07:19 the nature of the action, and the ability of class members to
11:07:22 institute individual lawsuits. And so in our response we did
11:07:25 vigorously contest numerously of the NGRI class, and as of July
11:07:31 15th, 2019, there are only two NGRI -- NGRI individuals on the
11:07:35 wait list.
11:07:37 And, as we mentioned earlier, the NGRI individuals
11:07:40 who have been committed to an HHSC facility are generally given
11:07:44 priority to comport with the Texas Code of Criminal Procedure.
11:07:48 Furthermore, NGRI plaintiffs generally have their own criminal
11:07:50 lawyers who could bring individual claims.
11:07:52 And we argue this in our motion, so I won't belabor
11:07:57 it too much, but there's precedent for this exact type of class
11:08:00 being denied out of the Middle District of Louisiana, which
11:08:04 found that, because the identity of the plaintiffs were readily
11:08:09 ascertainable because Louisiana compiled information about
11:08:13 them, it was -- there was no obstacle to joinder even though
11:08:18 the population of the punitive plaintiffs was often in flux.
11:08:22 And the same thing is true here, Your Honor.
11:08:25 Individuals can only become part of the proposed NGRI class
11:08:29 once they are adjudicated not guilty by reason of insanity and
11:08:32 a commitment order is issued. HHSC maintains information from
11:08:36 around the state that allows state hospital personnel to easily
11:08:39 and readily identify all individuals who have a forensic order
11:08:42 of commitment. And so the NGRI class is not so numerous that
11:08:46 joinder is impractical, and NGRI plaintiffs, again, could bring

their own as-applied challenges.

Finally, Your Honor with respect to adequacy of representation, we don't dispute that Plaintiffs have competent class counsel, but there are potential conflicts between Disability Rights Texas when you look towards the end of the case, the potential remedy. And, frankly, there isn't case law on point because this is a unique situation.

What they have said, and they said in their presentation repeatedly, is that HHSC has a self-imposed limit on forensic capacity. And so what that means is that HHSC limits the beds available to about 65 percent of the state hospital beds so that 35 percent of the beds can be served for people who are on civil commitments. So those are folks with court-ordered commitments to receive HHSC services and voluntary commitments, those folks going through an acute psychiatric crisis who need the state hospital system.

The potential remedy, which would -- to increase the forensic capacity of the state hospitals, would mean decreasing the capacity for civil commitments, and Plaintiffs acknowledge that they are also charged with representing those civil commitments. And so that's where the potential conflict is, which, you know, as part of its rigorous analysis the Court must consider. Even though the conflict might not be apparent right now, it's certainly something that could happen later on in the case.

11:10:16 Furthermore, we don't challenge that the law of the
11:10:19 case is that Plaintiffs' claims fit within the inherently
11:10:23 transitory exception to the mootness doctrine. But mootness
11:10:29 doesn't absolve the Court of making an adequacy determination
11:10:33 with respect to the named plaintiffs, as the Fifth Circuit
11:10:36 recognized in the *Ward* opinion. And, in fact, in a footnote
11:10:39 the Fifth Circuit recognized that the fact that the duration or
11:10:42 the time of their commitment can be so small raises some
11:10:46 complexity to the analysis.
11:10:49 Furthermore, the Court cannot simply assume that
11:10:51 these plaintiffs will once again be charged with committing a
11:10:54 crime such that they will again be subject to the first-come,
11:10:57 first-served policy. And that's directly from a Supreme Court
11:11:01 case called *O'Shea v. Littleton*, which explained that it seems
11:11:05 that attempting to anticipate whether and when someone will be
11:11:09 charged with a crime and will be made to appear before a court
11:11:13 takes us into the area of speculation and conjecture.
11:11:17 Furthermore, given that none of them are currently in
11:11:20 the proposed class, in that they've all been admitted to a
11:11:24 state hospital, this at least raises a question of whether they
11:11:27 will be the vigorous advocate that the Fifth Circuit
11:11:31 envisioned. So, again, we're not trying to make a categorical
11:11:36 claim. What we're trying to do is address the analysis that
11:11:39 the Court raised and put the plaintiffs to their burden of
11:11:41 identifying each of the ways that they meet Rule 23(a)'s and

Rule 23(b)(2)'s analysis.

Your Honor, to conclude, on a surface level, we recognize the appeal of Plaintiffs' argument in favor of class certification. There is a first-come, first-served policy; they are proposing an injunction that, you know, has a specific time frame. But the Fifth Circuit required a rigorous analysis, including an analysis of the substantive law, which in this case involves a deep analysis and a deep dive into *Jackson v. Indiana*. And once that analysis is conducted, it becomes clear that this case is not amenable to resolution on a class-wide basis. For these reasons, Plaintiffs' motion for class certification should be denied.

If there are no further questions, we would submit the motion -- or our response to the Court in our briefing.

THE COURT: Thank you.

All right. At this point we're going to be in recess until 1:30 and then come back for the rebuttal by the plaintiffs. So at this time the court's in recess.

(Recess)

THE COURT: Ms. Snead, you may proceed with your rebuttal.

MS. SNEAD: Beth Mitchell is doing the rebuttal, Your Honor.

THE COURT: Okay. Ms. Mitchell, you may proceed with rebuttal.

13:29:24 MS. MITCHELL: Thank you, Your Honor.

13:29:32 I'm going to address some of the points raised by the defendant. Hopefully this will be short and sweet. I want to start off where the defendant suggested that the purpose of commitment is not found within the statute itself. In fact, the U.S. Supreme Court, and *Brown v. Taylor* just last year from the Fifth Circuit, articulated that, yes, when you are looking for the purpose of what a commitment is, you do look to the statute itself.

13:30:01 And so if we do look at this statute, under the incompetency to stand trial, it says there's a dual purpose for the confinement of an individual after they've been found incompetent to stand trial, and that dual purpose is either -- is examination and restoration services. So it's not just restoration, but it's examination and restoration.

13:30:21 And this is important because the defendant, you know, suggests that individuals are receiving medication in jail and, therefore, they are receive -- that that is sufficient for the purpose of their commitment, the restoration piece. However, there is that dual purpose of examination. Medications alone is not going to provide somebody with an examination about whether or not somebody remains incompetent to stand trial or not.

13:30:52 Additionally, there were four cases that -- similar cases to the one that we have here that talked about whether or

not medication in a facility -- in a jail was sufficient for competency restoration purposes, and that was:

Stiavetti v. Ahlin. In that case the court said that jails are not designed to promote the defendant's speedy return to mental competency, and so treatment is not sufficient;

Advocacy Center for Elderly & Disabled, finding that jail mental health services were insufficient to satisfy the *Jackson* requirement;

Terry ex. rel. Terry v. Hill, which also said that, though the jail had psychiatrists and nurses and provided special treatment to inmates with mental illness, continued confinement awaiting transfer to a mental health facility still violated the due process rights under *Jackson*; and

Trueblood that said jails are not hospitals. They are not designed as therapeutic environments and they are not equipped to manage mental illness or keep those with mental illness from being victimized by the general population of inmates.

THE COURT: And you've cited those cases in your briefing; is that right?

MS. MITCHELL: Yes, Your Honor.

THE COURT: All right.

MS. MITCHELL: And, in addition, you know, if we go back to slide 30, the Defendant's own expert, Dr. Faubion, indicated that they don't -- you know, they talk about all the

wonderful services they provide at the state hospital, which, of course, Plaintiffs don't contest; they do provide wonderful services. What Plaintiffs want is to get over to their hospitals so they can receive these wonderful services. But they also say they don't provide just medication when they're providing services for competency restoration.

What they indicate is they provide educational classes that are meant to provide a mock courtroom environment, psychiatric services that include adjunctive psychosocial rehabilitation programs such as music shop, printing classes, and some other treatment modalities, and all of those are necessary and are used to provide competency restoration.

This is actually consistent with what the Legislature also found is necessary to provide competency restoration. When, two years -- two sessions ago, the Legislature determined it was appropriate to begin to try jail-based competency restoration, it didn't just say okay, jail, you can provide jail-based competency restoration; it identified specific criteria of what was necessary in order for a jail to provide jail-based competency restoration.

And in slide 31, 32, and 33 of the PowerPoint are the -- are the criteria that the Legislature said was needed in order to provide competency restoration. So it said that, in order to do it, they had to operate in a designated space that was separate --

13:33:40 Stay back on 31 for a minute.

13:33:42 Operate in a jail that has a designated space that is separate from the space that is used for the general population. And this is consistent with Dr. Joel Dvoskin's affidavit, which also said that in order for there to be appropriate competency restoration, that it needed to take place in a therapeutic and physically safe environment, non-putative, and non-segregated environment.

13:34:07 The Legislature on the next slide, 32, went on to say that they also needed to have a multidisciplinary team approach that was directed towards the specific objective of restoring competency to stand trial. "Multidisciplinary team" doesn't mean a psychiatrist prescribing a medication for one particular illness, and that's it. A multidisciplinary team approach is psychiatrist, nursing, social worker. It's a group of professionals that help to provide what is necessary to ensure that it is an individualized treatment to restore the person to competency. And, again, this was consistent with Dr. Dvoskin, who also said it needed to be adequate psychiatric, psychological, social work and nursing services, and individualized treatment.

13:34:57 And, finally, the Legislature required on slide 33 that they -- that in order -- that the educational hours that were necessary had to be consistent with what the state hospitals already provided. So the Legislature understood that

13:35:15 1 the state hospital did provide educational hours -- again, not
13:35:19 2 just medication, but educational hours, which could include
13:35:22 3 those mock courtroom hours -- and that those were also
13:35:24 4 necessary for competency restoration services. And, again,
13:35:28 5 Dr. Dvoskin, consistent with that, said it must include an
13:35:31 6 educational intervention.
13:35:33 7 And so, as we see from Defendant's own expert,
13:35:39 8 Plaintiffs' expert, as well as the Texas Legislature itself,
13:35:42 9 jail-based competency restoration is not medication alone. It
13:35:46 10 is a -- there are a lot of different components to that.
13:35:50 11 And, in fact, the Legislature, knowing that
13:35:52 12 medication was not sufficient alone, where it allowed for
13:35:56 13 court-ordered medication on slide 34, actually, specifically
13:36:03 14 said that, when you provide medication, it does not constitute
13:36:08 15 authorization to keep them in the facility for competency
13:36:13 16 restoration treatment.
13:36:14 17 So, again, Defendant's contention that medication
13:36:16 18 alone in the jail is sufficient for the purpose of competency
13:36:21 19 restoration is not accurate, and it also does not take into
13:36:25 20 account the dual purpose of the examination that is also
13:36:28 21 required.
13:36:29 22 I want to go to slide 13 and kind of go through this
13:36:35 23 wait list to kind of explain it a little bit more, these two
13:36:39 24 wait lists. There's a clearinghouse wait list and an MSU wait
13:36:43 25 list. The clearinghouse wait list is people who -- the law has

changed, but previously it was people who had a non-dangerous crime. And, if you had a non-dangerous crime, there are twelve facilities across the state, state hospitals, that you could go to. And you could go to any one of those facilities.

If you were charged with a violent crime, then you were considered manifestly dangerous, just the charge of the crime, and you were placed on the MSU list, which only had you go to two facilities in the state of Texas, Vernon State Hospital -- actually, one facility plus one unit. And Rusk State Hospital has a single unit.

And so that's the way HHSC divides its lists. The clearinghouse list is only people -- currently, is only people who are found incompetent to stand trial. The MSU list actually includes people who are incompetent to stand trial and the few people who are found not guilty by reason of insanity, because all people who are found not guilty by reason of insanity, the only ones that go into a facility are the ones charged with violent crimes. They're also part of the MSU list.

Plaintiffs' class combines those two lists and says all people who are incompetent to stand trial. So Plaintiffs' class is a combination of those two lists.

Currently, the clearinghouse list, because there are a lot of facilities, the average wait time on the clearinghouse list is 49 days for people to get off that list. For people to

get off of the MSU list the average wait time is 263. As Ms. Snead had previously indicated, some of the plaintiffs had waited way over a year, but these are the average wait times.

With the new law that the defendant brought up pretty quickly, the new law will now say: It doesn't matter what your crime is; you could go to any of the facilities. And so all that really means is that these two lists are going to -- there are still going to be wait lists because there currently are wait lists. It's just that the divvying up of the average wait time will change.

So now people who went to MSU could just go to the clearinghouse list, but that means that that wait time is going to increase and the MSU wait time might decrease. But, ultimately, we're going to end up somewhere in the middle, more than likely.

THE COURT: Well, do you think there will continue to be two wait lists, or will it be merged in the one wait list?

MS. MITCHELL: There will still be two wait lists because MSU wait list is for -- it's still for people who are -- that HHSC will determine might need a more secure facility than the other state hospitals. So there will still be two wait lists. But, right now, how that's going to turn out is completely speculative. That law just passed, and there is no indication how it will change where we are at this point.

And then, so, the defendant also indicated that the

13:39:45 NGRI are prioritized over the incompetent to stand trial
13:39:50 individuals who are on the MSU wait list, which is great,
13:39:54 although they are still -- the NGRI are still remaining beyond
13:39:58 14 days. But they never said that the -- even if they're
13:40:04 prioritized over the incompetent to stand trial, they never
13:40:07 argued that they still weren't going on a first-come,
13:40:09 first-served basis. It's just that the NGRI go on a
13:40:12 first-come, first-served basis, and the IST go on a first-come,
13:40:16 first-served basis, which is the two classes that we have
13:40:18 proposed for this lawsuit.
13:40:24 Next I want to turn to the issue of habeas that the
13:40:30 defendant raised, and habeas really goes to the issue of
13:40:34 joinder. You know, if everybody who ever had a claim could
13:40:40 bring a habeas action, you would have -- you know, currently
13:40:44 there's, what, 600 people on the wait list? You would have 600
13:40:48 habeases across the state of Texas. Big problem with that
13:40:51 because you could get varying decisions. In fact,
13:40:54 Charlie Baird, an attorney here, recently filed a habeas for
13:40:57 one of his clients, and the court ruled that habeas means to
13:41:00 get somebody out. And the individual didn't want to get out of
13:41:04 jail. They wanted to get into the state hospital to start
13:41:07 receiving competency restoration services, so a habeas wasn't
13:41:10 the appropriate remedy to bring.
13:41:11 So, in fact, there are already courts that are saying
13:41:13 a habeas isn't appropriate. There are probably other courts

13:41:16 that have said it is, but you're going to get a whole bunch of
13:41:19 different decisions across the state of Texas, which is why
13:41:22 joining everybody into a class action to have one decision that
13:41:25 provides one result is the best way to bring this -- resolve
13:41:29 this situation.

13:41:42 Next I want to talk about the joinder of the NGRI
13:41:47 class where the defendant alleged that, based on a similar
13:41:52 case, that the court had said they -- that the unnamed class
13:41:57 members were easily identifiable and so joinder was therefore
13:42:02 practical and numerosity wasn't satisfied.

13:42:04 I think, first of all, in that case there was a lot
13:42:07 less amount of people that were currently found not guilty by
13:42:11 reason of insanity, and few -- and the idea of future unknown
13:42:16 members was also going to be significantly less than what we
13:42:19 have here.

13:42:20 But the problem with that is that, although it's easy
13:42:23 for the State to identify who those unknown future people may
13:42:26 be, it's not going to be easy for anybody who wants to help
13:42:29 those future unknown people. These are individuals who have
13:42:32 disabilities who are often -- who are in jail, who often are
13:42:36 isolated in 24-hour or 22 administrative segregation, so people
13:42:42 can't even get to them to know where they are, to talk to them,
13:42:44 to bring lawsuits on their behalf. And so even though the
13:42:47 State may know who they are, the people who want to help them
13:42:51 would not know who they are.

13:42:56 And just a tidbit of information, and it's not -- it's new evidence, but they indicated that none of the plaintiffs are adequate because they're not currently in jail, and so they wouldn't have -- they wouldn't -- they're not adequate because they're not there.

13:43:12 Actually, Plaintiff Jones is now back in jail. So he was found incompetent to stand trial; he went over to the state hospital and received appropriate competency restoration services and was found competent; got sent back to the jail where he received the medications that the jail provides and became incompetent again because medications are not sufficient competency restoration services. But he's now currently in jail waiting to go back to the state hospital for competency restoration treatment.

13:43:43 I also wanted to talk about the idea that HHSC should be the one who comes up with how they want to fix this problem. The issue with that is that this issue has been going on since 2006. HHSC has known -- they started their wait list in 2006. They've known it's been going on since 2006, and yet the wait list has only increased. So for the past -- they've had 13 years to try to fix this problem, and it has yet to be fixed. And, in fact, it's only gotten worse.

13:44:16 If we turn to slide 97, they talk about -- slide 97? Yeah -- they talk about how they're getting new beds. But, yet, from 2016 to 2019, they actually eliminated 128 beds.

That's how they fixed the problem, by eliminating 128 beds.

They talk about how they're now looking at adding additional beds, and in 2021 they're going to have all these other new beds. But, if we turn to slide 98, they actually commissioned this CannonDesign consultant to come in to determine what number of beds the State needed in order to address the population that it has for state mental health beds.

And in that report, which was in 2017, it determined that it needed 1100 new beds and a 180 maximum security beds, right? With 1100 new beds, so from 2017 to now is five years means they needed 500 new beds by 2021, which is when the defendant is going to get all these new beds online. But they would have needed 500 beds.

But if we turn to slide 98 -- or 99, sorry -- Deputy Commissioner Mike Maples specifically said that they aren't -- they're only going to have 350 beds, not 500 beds, and they aren't going to have the 180 new maximum security beds that are need. So, although Defendant indicates they're going to get all of these new beds, it's still not the number of beds that, in 2017, a consultant that the Defendant brought in said they needed.

And, lastly, I want to -- actually, going to the "any kind of relief is going to hurt the civil population," one, this is just speculative because twice now they've actually

13:46:23 reduced the wait list to 21 -- to less than 21 days, both when
13:46:30 Plaintiffs had brought lawsuits against them. When that
13:46:32 happened, they didn't indicate that the civil beds rose. In
13:46:36 fact, in their interrogatories they said that the way they
13:46:40 addressed it was by increasing new beds, by contracting with
13:46:45 private facilities for civil beds, and by increasing their
13:46:49 staffing so that a lot of their beds that were sitting on their
13:46:52 campuses empty because they didn't have staff to fill them they
13:46:55 used them so they could have staff fill those beds.
13:46:59 Additionally, civil -- people who are committed who
13:47:03 are on a civil commitment are in the community. There's no
13:47:06 indication that they're being confined somewhere. So their
13:47:10 harm is not the same, because they are already in the community
13:47:13 receiving services in the community.
13:47:22 I also want to address the standard of care raised by
13:47:29 the defendant where he suggested that the standard should be
13:47:31 the deliberate indifference standard. Although I think it's
13:47:35 pretty clear from *Hare v. City of Corinth*, when you have a
13:47:43 conditions of confinement case that the -- that the standard is
13:47:47 rationally related to a legitimate government interest, whereas
13:47:50 when you have an episodic act case, that's when you use
13:47:54 deliberate indifference standard.
13:47:56 In this case we are looking at systemic conditions of
13:48:00 confinement case. As *Jackson* suggests, it's about "reasonably
13:48:03 related to a legitimate government purpose." That is the

13:48:06 standard in this case. I don't think that the Court, it's even
13:48:10 necessary at this time to reach that, but, if it were, that
13:48:13 should be the standard. But I did want to talk about, even if
13:48:18 it were a deliberate indifference standard --
13:48:21 THE COURT: So *City of Corinth v. Hare* is the
13:48:23 standard you think the Court should apply if the court gets
13:48:26 there?
13:48:26 MS. MITCHELL: Yes. And *Hare* lists two standards.
13:48:29 It talks about the episodic acts and about a conditions case
13:48:32 and tells you which one applies.
13:48:34 THE COURT: Okay.
13:48:35 MS. MITCHELL: But, even if it were the deliberate
13:48:37 indifference standard, I think Plaintiff still meets that.
13:48:40 Under *M.D. v. Perry*, the court said that the deliberate
13:48:43 indifference standard is to show that there is systemic
13:48:47 deficiency that causes an unreasonable risk of harm and that
13:48:50 the defendants had actual or constructive knowledge of that
13:48:54 risk.
13:48:54 Well, when the defendant first came up here, his
13:48:56 first statement was HHSC knows that there is a problem. So
13:49:00 they have actual knowledge. They know there is a problem.
13:49:03 There is no -- nobody's contesting that they did not have
13:49:09 actual and constructive knowledge of this issue.
13:49:11 And there is a systemic deficiency, and they're aware
13:49:15 of that, too. And that deficiency is causing harm to all of

13:49:19 the plaintiffs when they have to wait months, and potentially
13:49:22 years, in jail when they haven't been convicted of a crime or
13:49:26 when they've been acquitted of a crime and yet they still
13:49:29 remain day after day without any reason, because they're not
13:49:33 getting competency restoration or examination while they are
13:49:38 waiting in a jail.
13:49:39 And that is all I have unless you have any additional
13:49:42 questions, Your Honor.
13:49:42 THE COURT: No. I want to thank both sides for what
13:49:44 I think are extremely well-presented presentations. And, of
13:49:50 course, where we are is we're not to the merits yet; we're
13:49:54 still deciding who is going to urge the merits.
13:49:58 I wish I could give you some good news and tell you
13:50:01 we'll have an opinion out tomorrow, but we won't. As I
13:50:04 mentioned earlier, and I reiterate it -- and whenever you
13:50:07 appear in my court for probably the rest of my life, you're
13:50:11 going to hear me whine about this -- we are underwater in the
13:50:15 Austin Division of the Western District of Texas. Don't ever
13:50:18 use "emergency" in my court because everything is an emergency.
13:50:21 We can't get to the emergencies timely.
13:50:25 But I think you've well presented this case. It is
13:50:28 submitted, and we will work hard to get an opinion out on it as
13:50:32 quickly as possible. So thank you again. I mean it. I
13:50:36 thought the presentations focused the Court right into what the
13:50:39 Court ought to look at. I think you-all touched the topics

13:50:45 that the Fifth Circuit wanted touched.

13:50:48 We'll prepare an opinion, and then one of you undoubtedly will want to go back to New Orleans with it. So we'll see how that works out at that point.

13:50:54 So at this time the court's in recess. Thank you.

13:50:56 (End of transcript)

UNITED STATES DISTRICT COURT)

WESTERN DISTRICT OF TEXAS)

I, Arlinda Rodriguez, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 3rd day of December 2019.

/S/ Arlinda Rodriguez
Arlinda Rodriguez, Texas CSR 7753
Expiration Date: 10/31/2021
Official Court Reporter
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